

Capital Reporting Company
Hearing Volume V 04-26-2010

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BEFORE THE UNITED STATES COPYRIGHT ROYALTY JUDGES

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WASHINGTON, D.C.

ORIGINAL

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IN THE MATTER OF: :
:
DIGITAL PERFORMANCE RIGHT IN : Docket No. 2009-1
:
SOUND RECORDINGS and EPHEMERAL: CRB Webcasting III
:
RECORDINGS : Volume V
:
- - - - - x

Washington, D.C.

Monday, April 26, 2010

The following pages constitute the
proceedings held in the above-captioned matter held at
the Library of Congress, Madison Building, 101
Independence Avenue, Southeast, Washington, D.C.,
before Denise M. Brunet, RPR, of Capital Reporting
Company, a Notary Public in and for the District of
Columbia, beginning at 9:32 a.m., when were present on
behalf of the respective parties:

1 A P P E A R A N C E S

2

3 Copyright Royalty Tribunal:

4 CHIEF JUDGE JAMES SLEDGE

5 JUDGE WILLIAM ROBERTS

6 JUDGE STANLEY C. WISNIEWSKI

7

8 On behalf of SoundExchange, Inc.:

9 DAVID A. HANDZO, ESQUIRE

10 MICHAEL B. DeSANCTIS, ESQUIRE

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22 (Appearances continued on the next page.)

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1 A P P E A R A N C E S (Continued)

2

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22 (Appearances continued on the next page.)

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1 A P P E A R A N C E S (Continued)

2

3 On behalf of Live365, Inc. (continued):

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1	C O N T E N T S				
2	WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
3	JOHNIE FLOATER				
4	By Mr. Oxenford	861			
5	By Mr. DeSanctis		904		
6	By Mr. Oxenford			1039	
7	By Mr. DeSanctis				1047

9	EXHIBIT NO.	RECEIVED
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1 P R O C E E D I N G S

2 CHIEF JUDGE SLEDGE: Thank you. We'll come
3 to order. I hope all had a good weekend. We're
4 anxious to continue our inquiries. All right. As I
5 understand it, we've moved on in the direct case to
6 the presentation by Live365 of their direct case.

7 Mr. Oxenford.

8 MR. OXENFORD: Yes, Your Honor. We notified
9 the parties and the witnesses that we have decided not
10 to offer the testimony of N. Mark Lam, so we'll have
11 only one witness today, Mr. Floater. Mr. Floater is
12 prepared to testify. We've exchanged the schedule
13 that said that our remaining two witnesses, Dianne
14 Lockhart, who we certainly believe will be a short
15 witness -- and certainly I don't want to speak for
16 SoundExchange, but I believe that they also think that
17 she will be a very short witness -- will be on
18 tomorrow morning. And then our expert, Mr. Fratrik,
19 will follow Ms. Lockhart. We do expect to be
20 completed tomorrow, barring any unforeseen --

21 CHIEF JUDGE SLEDGE: Well, all of that is
22 news to us. We got late Friday your schedule that you

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1 filed, and we got it just shortly before we started
2 the proceeding this morning of your schedule of
3 witnesses, and that begins with Mark Lam and Johnie
4 Floater second for today.

5 MR. OXENFORD: Yes, Your Honor. We made the
6 decision over the weekend not to offer the testimony
7 of Mr. Lam. We did send an e-mail to your office
8 yesterday and copied all the other parties. We
9 notified SoundExchange on Saturday evening that we
10 would not be offering Mr. Lam.

11 JUDGE ROBERTS: To clarify, Mr. Oxenford,
12 there's not a stipulation as to Mr. Lam's testimony.
13 You're simply withdrawing it?

14 MR. OXENFORD: We're withdrawing his
15 testimony --

16 JUDGE ROBERTS: Okay.

17 MR. OXENFORD: -- and we will not offer his
18 direct case exhibit.

19 JUDGE ROBERTS: All right.

20 CHIEF JUDGE SLEDGE: I don't recall this
21 arising before. Is this covered in the regulations
22 that -- do you have the authority just to withdraw a

1 witness?

2 MR. OXENFORD: Well, Your Honor, I believe
3 it's our direct case exhibit, and we can make the
4 decision as to what evidence that we wish to present.
5 My understanding is in the 115 proceeding, certain
6 witnesses were withdrawn when they had offered direct
7 case exhibits and not presented. I do not believe
8 there's any specific --

9 CHIEF JUDGE SLEDGE: Well, I think that was
10 by stipulation.

11 MR. OXENFORD: Pardon me?

12 CHIEF JUDGE SLEDGE: Wasn't that by
13 stipulation?

14 MR. OXENFORD: I do not know. I just know
15 that there were certain witnesses whose direct case
16 exhibits were withdrawn, not offered by the parties.

17 To me, it's our case. We're providing the
18 evidence to this court. If we have made the decision
19 not to provide certain evidence, it's to our potential
20 detriment, but we're -- made the decision not to offer
21 that evidence to this court.

22 CHIEF JUDGE SLEDGE: Well, the first thing I

1 look at is 351.9(d): Each party will provide all
2 other parties notice of the witnesses who are to be
3 called to testify at least one week in advance of such
4 testimony -- and Live365 did not do that. And then,
5 Unless modified by applicable trial order -- and then
6 it goes on to exhibits. That would appear to be in
7 conflict with what you just proposed.

8 MR. OXENFORD: Well, Your Honor, we did
9 provide that notice a week ago that we did intend at
10 that point to offer Mr. Lam.

11 CHIEF JUDGE SLEDGE: I thought it was late
12 Friday.

13 MR. OXENFORD: We also -- we provided an
14 original notice on April 19th that we would offer
15 Mr. Lam, Mr. Floater, Dianne Lockhart and Mark Fratrik
16 as our direct case. On Friday, we simply were
17 following up to provide the dates for this court so
18 that you would have our schedule of witnesses.

19 Again, this weekend we made the determination
20 not to offer the direct case exhibits of Mr. Lam.
21 Certainly we provided the notice so that all parties
22 would be prepared, were we to go ahead with the direct

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1 case exhibits that we had exchanged.

2 But we have made, again, as a matter of our
3 strategic decision, not to offer Mr. Lam.

4 CHIEF JUDGE SLEDGE: Any response to that
5 statement?

6 MR. HANDZO: Your Honor, I frankly don't
7 recall what the practice was in the 115 case. I know
8 that witnesses were withdrawn. I think it was
9 probably not by stipulation. I think it was probably
10 at the option of the party. I think our view is that,
11 as Mr. Oxenford says, if a party chooses to withdraw
12 its witness, it does so at its own peril that it has
13 eliminated evidence that it obviously originally
14 thought would support its case and now it doesn't have
15 that evidence, but that's an option of the party.

16 CHIEF JUDGE SLEDGE: Any other response?

17 MR. MALONE: I have nothing to add, Your
18 Honor.

19 CHIEF JUDGE SLEDGE: This unprecedented
20 action will require some discussion. We'll be in
21 recess.

22 (Whereupon, a short recess was taken.)

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1 CHIEF JUDGE SLEDGE: Thank you. We'll come
2 back to order. Well, without any objection, the
3 witness, Mark Lam, is withdrawn and his written direct
4 statement will not be considered.

5 Next witness.

6 MR. OXENFORD: Yes, Your Honor. At this
7 point, we would ask to call the witness Johnie
8 Floater.

9 WHEREUPON,

10 JOHNIE FLOATER,
11 called as a witness, and after having been first sworn
12 by the chief judge, was examined and testified as
13 follows:

14 DIRECT EXAMINATION

15 BY MR. OXENFORD:

16 Q Good morning. Could you please stat your --

17 A Good morning.

18 Q Could you please state your name for the
19 record.

20 A My name is Johnie Floater.

21 Q And could you spell that for the court
22 reporter.

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1 A J-O-H-N-I-E, F-L-O-A-T-E-R.

2 Q And with whom are you currently employed?

3 A Currently employed with Live365, Inc.

4 Q And what is your current position with
5 Live365?

6 A My current position is general manager,
7 media.

8 Q And how long have you been employed with
9 Live365?

10 A I started as a consultant with Live365 in
11 October of 2004. I became a full-time -- I mean
12 pretty much full-time consulting role. And I became a
13 full-time staff position in January of 2006.

14 Q And can you please provide the judges with a
15 summary of your duties as general manager of media for
16 Live365.

17 A Yes. My role is, on the Internet radio
18 activities of the company, I'm responsible for
19 generating revenue from the advertising and
20 subscription services that are made possible by
21 gathering audiences to listen to content available
22 over Live365.com.

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1 MR. OXENFORD: Your Honor, may I approach the
2 bench and the witness with what has been marked as
3 Live365 Exhibit 29?

4 BY MR. OXENFORD:

5 Q Mr. Floater, I ask you to open the binder and
6 refer to the first 15-page statement. Do you
7 recognize that statement?

8 A Yes, I do.

9 Q And can you tell the court what that is,
10 please.

11 A This is my written testimony that I provided
12 in reference to the issues before the court here in
13 this rate-setting proceeding.

14 Q And who prepared this testimony, Mr. Floater?

15 A I prepared the draft, the writing of it. I
16 prepared the entire document.

17 Q And I would refer you to page number 15. Is
18 that your signature on page number 15?

19 A Yes, it is.

20 Q Now, are there any corrections that you made
21 in this testimony since it was first prepared?

22 A When I had my deposition I was reviewing my

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1 numbers in the document, and I had put in the sales of
2 music products through affiliate partners on Live365
3 was approximately \$1.5 million. I thought I could get
4 a little more accurate, and I reran the numbers. And
5 so in my deposition I corrected the number that was
6 actually \$1.3 million.

7 Q And I refer you to page -- paragraph 30 on
8 page 12 of your statement. Is that the correction
9 about which you just testified?

10 A Yes. Here it is. Yeah, was generated
11 1.3 million. I think in my original line was I had
12 generated nearly \$1-1/2 million.

13 Q Now, are there other corrections that were
14 made in this testimony, Mr. Floater?

15 A As I said, I prepared this document myself.
16 I am not an attorney, and in -- for preparing for
17 today, I realized that I had included a couple of
18 phrases that would have required a legal conclusion.
19 I am not an attorney and so, upon advice of counsel, I
20 deleted a couple of phrases that resulted in a legal
21 conclusion I'm not in a position to make.

22 Q With those corrections, is this document true

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1 and correct to the best of your knowledge and belief?

2 A Yes, it is.

3 Q I ask you, Mr. Floater, to turn to tab
4 number 1 in the binder.

5 A Uh-huh.

6 Q Can you tell us what tab number 1 -- the
7 document behind tab number 1 is?

8 A Yes. When stations broadcast on Live365,
9 each broadcaster gets to select which musical genre
10 they belong to. And I went to the Live365 website and
11 took a -- basically a download of the list of the
12 genres that the stations are classifying themselves
13 under at this time.

14 Q And is this a true representation of the list
15 of genres from the website of Live365?

16 A Yes. It's -- it's an amazing collection of
17 260-plus genres of a variety of music that our
18 webcasters are broadcasting.

19 Q Do you know, from your personal knowledge, if
20 Live365 offers these genres of music?

21 A Yes.

22 Q I ask you to turn to tab number 2 and look at

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1 the document behind tab number 2 in this binder.

2 A Uh-huh.

3 Q Can you identify what that is at tab
4 number 2?

5 A These are screen shots of the various webcast
6 players that the audience uses to listen to the
7 various music genres on Live365. The top one we call
8 Player 365. It is our advertising-supported player.
9 It has, in the right side, either an advertisement or
10 the click-to-buy situation for the song, particular
11 song that's playing at the time. The bottom one is a
12 special player which has more features, and it's
13 available to subscribers of Live365, our VIP
14 membership. It's a paid membership.

15 And -- so these are screen shots of what
16 someone would see on a website when they were
17 listening to the music from the channels.

18 Q Is there anything on this page that a viewer
19 would not see if they went to the Live365 player?

20 A Obviously, the track that was playing at the
21 time would be different. And then I -- actually the
22 little "buy" button with those arrows I added to

1 highlight the fact that we link the particular track
2 that's playing to give the chance to buy the download
3 or buy a CD of the music through one of our affiliate
4 partners. But those red "buy" buttons would not be
5 something the player -- I mean, they would see the
6 Amazon and they would see "buy download," but the
7 actual little red arrow is something I added.

8 Q Mr. Floater, I ask you to turn to the
9 document following tab number 3 titled, "Live365,
10 Inc., license and release agreement." Can you
11 identify the document behind tab number 3?

12 A This was an agreement that was made between
13 Live365 and a music company called GarageBand where
14 the arrangement was made to allow GarageBand to put
15 music into our -- a music library that our webcasters
16 could access so that they could include these
17 streams -- they could include in their stream
18 particular tracks from GarageBand and receive various
19 types of promotion. And the benefit to -- that was
20 the benefit to GarageBand.

21 The benefit to the broadcasters was that
22 GarageBand had secured the rights to these artists and

1 the tracks and they waived the sound recording
2 performance royalties to have additional promotion and
3 simple inclusion in the webcaster's broadcast.

4 Q Now, Mr. Floater, are you familiar with the
5 document behind tab number 3?

6 A Yes, I am.

7 Q And is this an accurate copy of the agreement
8 between Live365 and GarageBand Records?

9 A Yes, this seems to be the original copy of
10 the agreement.

11 Q You say it seems to be.

12 A Yes, this is the agreement that I am familiar
13 with.

14 Q Thank you. I ask you to turn to the document
15 behind tab number 4. Can you identify that document,
16 please.

17 A This is a similar agreement to the GarageBand
18 agreement, another music company that provided Live365
19 a variety of royalty-waived performances, again, to
20 receive promotion and inclusion in the Live365
21 webcasters that sold performances within their
22 stations.

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1 Q And are you familiar with that agreement?

2 A Yes, I'm familiar with this agreement.

3 Q And is this a true and accurate copy of the
4 agreement between Live365 and --

5 A This one is with a company INgrooves. Yes,
6 this is another similar -- this is the agreement.

7 Q Thank you. And I ask you to turn to the
8 document behind tab number 5.

9 A Yes.

10 Q Can you identify that document?

11 A Yes. This is, again, another similar
12 agreement between a music company and Live365 for --
13 where they provided us with musical tracks for
14 inclusion of webcaster's performances on the webcaster
15 channels. In exchange for promotion of the stations,
16 they waived the royalties related to the sound
17 recording performance to secure those performances.

18 Q And are you familiar with that document?

19 A Yes, I am.

20 Q And is this an accurate copy of the agreement
21 between Live365 and DMI?

22 A Yes, it is.

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1 Q Finally, Mr. Floater, I ask you to turn to
2 the document behind tab number 6 in the binder. Can
3 you identify that document, please?

4 A Yes, I can. It's, again -- once again, it is
5 an agreement between a record label and Live365 that
6 they would provide us musical tracks included into our
7 library that our webcasters would have access to to
8 include in their station performances. And they
9 waived the rights in order to receive those
10 performances and promotions related to those artists.

11 Q Which record label is that?

12 A And this is a company called Soleilmoon.

13 Q And are you familiar with the agreement
14 between Live365 and Soleilmoon Records?

15 A Yes.

16 Q And is this, in fact, that agreement?

17 A This is that agreement.

18 MR. OXENFORD: Your Honor, Live365 would like
19 to offer into evidence the written statement and
20 attached six tabs of material at this time.

21 CHIEF JUDGE SLEDGE: Any objection?

22 MR. DeSANCTIS: Your Honor, I do object only

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1 on the ground -- I do object with respect to the
2 written direct statement only on the ground that it
3 contains at least a couple of references to the
4 written testimony of Mark Lam which now is not part of
5 the record, so I think it risks making a particularly
6 confusing record in the case, but that would be my
7 only objection.

8 MR. OXENFORD: Your Honor, we would certainly
9 agree to having any reference to the statements of
10 Mark Lam struck from this testimony.

11 MR. DeSANCTIS: I should clarify that I'm not
12 saying there are statements from Mark Lam in the
13 testimony. There are simply references to Mark Lam's
14 written direct testimony which now has not come into
15 evidence.

16 CHIEF JUDGE SLEDGE: So are you withdrawing
17 the exhibit?

18 MR. OXENFORD: No, we're withdrawing those
19 statements that refer to the evidence of Mark Lam.
20 Clearly, there's no evidence to refer to. So the
21 court will give those references no weight because
22 there's nothing to refer to.

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1 CHIEF JUDGE SLEDGE: What do we do with
2 Exhibit 29, then?

3 MR. OXENFORD: We would accept it into
4 evidence with the understanding that --

5 CHIEF JUDGE SLEDGE: Are you going to change
6 it and resubmit it?

7 MR. OXENFORD: Yes, Your Honor. We will
8 resubmit it with those references to the testimony of
9 Mark Lam excised.

10 CHIEF JUDGE SLEDGE: All right.

11 MR. OXENFORD: Thank you, Your Honor.

12 BY MR. OXENFORD:

13 Q Mr. Floater, could you please describe your
14 higher education.

15 A I graduated with an MBA from University of
16 California Los Angeles in arts management. This was a
17 program set up in the late '70s by the business school
18 there, now the Anderson Business School, to assist art
19 organizations to be able to run as businesses.
20 Funding for symphony orchestras and ballet companies
21 and, in my case, public radio were being decreased,
22 and so I picked up an MBA in order to learn how to run

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1 these art organizations as businesses. So I have an
2 MBA from UCLA.

3 Prior to that, I had in -- my undergraduate
4 degree was from Aquinas College in Grand Rapids,
5 Michigan. I had a mathematics and psychology
6 background with a teaching certification. I was
7 working in radio when I was a kid and I had always
8 thought that Sesame Street and Electric Company were
9 pretty cool, and I was going to figure out how to use
10 education in broadcasting. So I got a teacher's
11 degree in my undergraduate.

12 I attended Michigan State University for a
13 summer broadcast program on a scholarship that I
14 received from the local broadcaster, WOOD-TV.

15 That's my basic three degrees.

16 Q And can you -- I'm sorry. Mr. Floater, have
17 you worked in over-the-air broadcasting prior to your
18 employment with Live365?

19 A I would say that I've worked -- my first job
20 outside of being a paper boy -- my first paycheck came
21 from WLAV, Sheppard Broadcasting, AM and FM, in Grand
22 Rapids, Michigan. I worked my way through high school

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1 there. I managed the music library, assisted the
2 advertising department in carting up the commercials
3 to go on the air.

4 I started a junior achievement company back
5 in high school, Marconi and Zworykin, which received
6 air time from local television and radio channels, and
7 we produced programs and sold our own advertising for
8 it.

9 Following my MBA degree -- I was working at
10 the public radio station in Los Angeles while I was
11 working on my MBA, a station called KCRW. At the
12 time, we became a national public radio station, and I
13 used my business degree to set up the initial business
14 aspects of the station.

15 When I graduated from my MBA, I became the
16 business manager and membership coordinator for the
17 station. I did the corporate underwriting, wrote
18 grants to expand our web -- our broadcasts throughout
19 southern California with additional repeaters. I
20 started syndicating some of the radio programs.

21 We -- Tim Hauser from Manhattan Transfer was
22 one of our broadcasters and had interest in

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1 syndication to other public radio stations. So I
2 started a syndication group for the station. That led
3 me to meet what is commonly known as the father of
4 syndication, Mr. Tom Rounds. He had a company, ABC
5 Watermark, that had created programs like Casey
6 Kasem's American Top 40 and American Country Countdown
7 with Bob Kingsley. And so I left public radio to
8 learn syndication, as I thought it was a business
9 opportunity for public radio. So I spent a number of
10 years handling the syndication of radio programs.

11 When ABC took complete control of the
12 company, we formed a company called Radio Express.
13 And I served there as the general manager distributing
14 these programs and other broadcast tools to a growing
15 market of radio around the world, as private radio in
16 the '80s were becoming allowed in other countries and
17 needed basic services to start up. So we created a
18 company that would provide programming and broadcast
19 tools.

20 So that was my experience bringing radio
21 tools to new radio stations around the globe.

22 Q Now, following your experience in the

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1 broadcast industry, did you move to the Internet
2 industry?

3 A When I was traveling -- and I'd been to 50,
4 60 countries selling radio programs and localizing
5 those contents to local language, I saw the explosion
6 of the web, which is, at the time, in the early '90s,
7 pretty much an English language product. And I saw
8 the opportunities for localization of web services.
9 And so I became involved with one of the first
10 companies, web services companies, to go -- to go
11 public on NASDAQ, a company called Eagle River
12 Interactive, now agency.com, and I set up the
13 international capability.

14 And so they would get accounts with Disney
15 and Arthur Andersen and Sony. And then I would set up
16 and do partnerships and acquire companies in foreign
17 countries that would handle the localization of these
18 products to the other markets in the world. That
19 experience had [sic] me the opportunity to work with a
20 lot of young startups and putting in their business
21 operations, which led me to come back to my next job
22 which was with Rare Medium Group. It was a web

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1 services NASDAQ company in the U.S. And I ran their
2 incubator portfolio where they made investments with
3 typical Internet startups. And they were from music
4 companies like the publication and event company CMJ
5 in New York, a promotional company for advertisers
6 called ePrize, integrated messaging and that.

7 So I played a lot in the early web services
8 companies, especially in the startup market with small
9 companies that had interesting products, and taking
10 them into the web services activities.

11 Q Okay. Now, Mr. Floater, I would refer you to
12 your testimony, page 4, paragraph 7 --

13 A Excuse me one minute. Okay.

14 Q -- where there are references to the
15 businesses of Live365. Could you tell the court the
16 business lines of Live365?

17 A Well, Live365 has an unusual business model
18 in that it actually has two business models. One of
19 them that I am in charge of is its Internet radio
20 service where we package a bunch of different radio
21 channels and distribute it to audiences and sell the
22 advertising and subscription. Those channels also

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1 need additional services in order to be businesses.
2 And so we run a broadcast services company that
3 provides them hosting and bandwidth and programming
4 tools and software from ad insertion to subscription
5 management.

6 So we have -- we provide both broadcast
7 services to different webcasters, and then I package a
8 number of those channels and run an Internet radio
9 company.

10 Q Can you relate how the broadcast services
11 line of business -- I'm sorry. Strike that. Let me
12 start that question again.

13 Does the broadcast services part of business
14 have analogs elsewhere in the Internet radio industry?

15 A Does it -- excuse me?

16 Q Are there similar services elsewhere in the
17 Internet radio industry to broadcast services?

18 A All webcasters require the same type of
19 business services and tools. They all have to have a
20 place to host their content. They all need the
21 streaming technology. They all need ad insertion
22 technology. So many webcasters go to a variety of

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1 companies that are in the marketplace similar to the
2 Live365 broadcast service. There is -- in the hosting
3 side, there is Stream Guys, Stream the World, Akamai.
4 These are typical hosting companies that will take
5 your content and stream it.

6 Then there are companies that provide
7 broadcast tools, play list managers and things like
8 that, that are necessary for a webcaster to create a
9 station. SpacialAudio is a typical company like that.
10 RCS. These are companies that work with both the
11 broadcast terrestrial radio business and now are
12 finding opportunities in the Internet space. And then
13 there are music production services and jingle
14 packages and services like that.

15 So Live365's broadcast services is quite
16 similar to all of those type of basic companies out
17 there. We started our own broadcast services because
18 the complication of having to deal with ten different
19 companies in order to create a station was very costly
20 and time-consuming. And so, by being able to package
21 all of those offerings that other companies would have
22 had to provide our webcasters, we find it makes it

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1 more cost-effective to the webcasters if they could be
2 gathered and provided by a single service.

3 Q Now, let's turn to the other side of the
4 business, the Internet radio service business.
5 Mr. Floater, do you consider Live365 to be a
6 webcaster?

7 A Yes, Live365 is a webcaster.

8 Q Why?

9 A Webcasting is the act of streaming
10 performances to audiences, and that's exactly what we
11 do at Live365.com.

12 Q Now, focusing on your Internet radio service,
13 does Live365 sell advertising that appears on the
14 stations that are transmitted through your site?

15 A The typical business model for radio is to
16 generate revenue from -- if you attract audiences and
17 advertisers want to reach particular audiences,
18 there's revenue opportunities there. And so, yes, we
19 sell advertising in all of the content to the
20 audiences that are gathered to listen to the various
21 radio stations on Live365.com.

22 Q And can you explain the types of advertising

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1 sold by Live365?

2 A Well, the -- Live365 as a radio company has
3 very standard radio advertising which is in stream.
4 In between songs, you have 30-second radio spots. So
5 we have audio spots, very typical to radio.

6 On the web, because it's delivered on these
7 display graphic web pages, we put up banner
8 advertising, and we have the -- the IAB, the Internet
9 Advertising Bureau has some very standard packages
10 that advertisers buy, leader boards at the top,
11 skyscrapers down the side of a page, and rectangles
12 that fit in a player -- we've designed our player
13 window to hold those rectangles. Those are typical
14 advertiser banner advertisement. And so we sell that
15 banner advertising.

16 And in the last years with the bandwidth,
17 et cetera, there's something called video -- pre-roll
18 video. And so when a listener starts a station that's
19 a free listener that we are trying to cover the
20 royalties and broadcast costs, we distribute a
21 pre-roll video.

22 So we have the audio spots, display banners

1 and pre-roll video that are quite typical to all
2 Internet radio companies.

3 Q And who sells that advertising?

4 A The sales of the advertising comes from a
5 variety of sources. We have our own direct sales. I
6 mean, you're looking at him. At this point, I take
7 requests for proposals from various companies that are
8 trying to reach specific companies, although I've got
9 to say that the vast majority of our advertising comes
10 from ad networks that aggregate many different
11 channels and many more companies and many more
12 advertising opportunities besides just ad -- beyond
13 just radio -- Internet radio advertising. And so
14 there's ad networks out there, and we work with a
15 variety of ad networks from TargetSpot, ValueClick,
16 Tribal Fusion.

17 And they're working with large-scale clients
18 in their Internet radio and their terrestrial radio
19 and their display. So I would say that 85, 90 percent
20 of my advertising comes to me through our ad networks.

21 Q And why haven't you added more staff at
22 Live365 itself to sell advertising?

1 A The way the advertising business works,
2 advertisers like Coca-Cola or Esurance or whatever,
3 they usually work through an agency, an ad network
4 that I'm referring to, who buys all the multiple types
5 of advertising. And they're located in Chicago and
6 New York, in Dallas, in San Francisco. And so in
7 order to be doing business with those type of things,
8 you'd have to have people or extreme travel budgets to
9 visit those agencies, and the time.

10 And the cost of that kind of operation from
11 not only visiting for the sales but -- advertising is
12 a complete separate business besides webcasting. And
13 the cost of the research, following the clients,
14 knowing the agencies -- and these companies buy much
15 larger than the inventory that's available on Live365.
16 So I cannot -- they don't want to deal with 30 players
17 in order to do an ad buy. The agencies want to deal
18 with somebody who can carry it out through 20
19 different networks.

20 And so just -- it's a prohibitive cost to be
21 one media, one Internet radio with one -- only so much
22 advertising to -- it's too cost-prohibitive, as I was

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1 saying, in order to run a sales staff around the
2 country for just our advertising component.

3 Q Now, Mr. Floater, have you observed any
4 trends in the Internet radio advertising marketplace
5 since 2006?

6 A Trends? Well, I guess if I was looking at
7 trends, I see trends in my own data. I look very
8 closely. I've been involved since I came to the
9 company with the advertising side of the company. So
10 I have my own data. I attend a lot of conferences. I
11 just came from the NAB and the Internet radio
12 conference where I met a lot of other webcasters, so
13 we always talk about what's going on in the
14 advertising marketplace.

15 I'm the direct contact with our reps. So if
16 I was talking about trends, I would say, what am I
17 seeing from all of those inputs? I would say the
18 average -- the average price of the advertising, what
19 we call CPM, the advertising is bought by how much
20 someone is willing to pay to reach -- put 1,000 ads in
21 front of an audience. And so we sell advertising as
22 CPM, meaning the cost per every thousand that I

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1 deliver.

2 And I would say the average CPM price is
3 going down. I've seen this in all the advertising I
4 worked with. When banner advertising first came out,
5 it was a new product. It was very exciting.
6 Advertisers didn't have a chance to use banner
7 advertisements before. And in my very first web
8 companies, I would see banner advertising go for 14,
9 20, \$30 per CPM. Nowadays, an advertiser, you're
10 lucky to get \$1 CPMs for that because of the amount of
11 it out there. It's not a new product anymore.

12 In my own experience, when I got to Live365
13 in 2004, audio advertising and Internet radio was kind
14 of a new concept. And advertisers are not so
15 sophisticated at what it is, how well it's going to
16 work, there wasn't a lot of it. And so we saw
17 advertising CPMs for our -- on the average go for
18 about \$5. I got it up to as high as \$5. When I was
19 preparing my direct statement at that time, I was
20 looking at audio advertising, which represents the
21 vast majority of my ad sales now in terms of
22 revenue -- it had dropped to about

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1 three-and-a-quarter. And, in recent months, I'm
2 getting about \$2 CPMs.

3 So one of the trends I am definitely seeing
4 in my own data, and when talking to others, is the
5 average price of CPM is decreasing.

6 Talking just at this recent conference,
7 the -- I think another trend I'm seeing is that the
8 inventory available for advertisers to buy is vastly
9 increasing far beyond the demand.

10 And so although there's more ad dollars
11 moving into the Internet radio space -- I'm very happy
12 about that -- the available inventory is increasing
13 faster than the demand for it, and I think that is one
14 of the effects also on the average CPM.

15 Other trends? I would say that -- well, like
16 I noticed myself, when I got here --

17 CHIEF JUDGE SLEDGE: When you say demand,
18 you're referring to the demand by advertisers?

19 THE WITNESS: By advertisers to purchase the
20 inventory. And as an example, I've increased -- to
21 maximize my revenue from our stations, we break, every
22 hour, five times, typical to the amount of advertising

1 in a terrestrial radio station. And we -- I can run
2 up to ten ads per hour.

3 And with all of my reps out there selling,
4 with my own response to direct things, I'm selling
5 about -- of those ten spots per hour, I'm selling
6 about 60 percent, 65 percent of my audio spots at
7 Live365 with all my advertising sales efforts.

8 So -- you know, other companies I know that
9 don't have the size of Live365 are seeing maybe 10,
10 20 percent of their actual advertising get sold. And
11 obviously, inventory is controlled by if you run ten
12 spots or you run one spot, so there could be Internet
13 radio companies that are sold out, but they're sold
14 out because they put one spot an hour.

15 But in all of the inventory out there, I
16 would say that it's very hard to -- all advertising
17 isn't buying all the availability inventory. And I
18 think, as the inventory is increasing, the fill rate
19 is getting harder and more competitive to fill.

20 I was telling you that most of my sales come
21 through networks. I think originally you could sell a
22 client direct, Internet radio, what's that? Let me

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1 buy a little thing. Let me see how it's going. Now
2 Internet radio is being -- the buyers are becoming
3 very sophisticated, and it's becoming a part of the
4 advertising buy.

5 And so I would say that more and more of the
6 advertising is being purchased through these
7 traditional media companies, traditional networks.
8 And so my ability to get direct buys is limiting. One
9 of the trends I'm seeing is that my revenue from
10 advertising is being -- more and more coming through
11 ad networks which are traditional advertising
12 vehicles. This is how the advertising business works.

13 And the -- kind of the double-edged sword of
14 Internet radio advertising is it's very targetable.
15 And one of the trends I'm experiencing is, before, oh,
16 Internet radio, yes, I want to buy Internet radio.
17 And then it became, oh, well, I only want your daytime
18 advertising because buyers think the value of
19 advertising in the day is more valuable than at night.
20 So they began to request day parting, meaning, I only
21 want to buy your daytime advertising.

22 And then it became similar to terrestrial

1 radio. It wasn't just Internet radio anymore. We'd
2 like to buy your rock audiences. Or we would like to
3 buy your country audiences.

4 And because of my technology tools and my
5 trafficking system, I can take an Esurance ad or a
6 Walmart ad and I can only put it in the type of genre
7 at the type of time.

8 And the newest trend that I'm experiencing
9 right now is the request to geotarget. Oh, I only
10 want to reach an urban audience of high-end wealth,
11 educated in the New York area. And this trend is kind
12 of -- is -- the exciting part I was telling you is
13 they'll pay more. You get higher CPMs for that.

14 But the problem for an Internet radio
15 broadcaster that has all of these channels out here is
16 I have the same cost whether I'm delivering folk music
17 to the mountains of Colorado or I'm delivering rock to
18 a Los Angeles skater community.

19 And so the cost of delivering the programming
20 is the same, but the -- I am not getting the ad value
21 from each audience the same because the advertisers
22 are getting used to this trend of being able to -- oh,

1 I only want to buy that now.

2 And so I would just say the demand for
3 targeting and our requirements to build more
4 technology to allow this is one of the significant
5 trends that are currently going on in the ad market in
6 Internet radio.

7 BY MR. OXENFORD:

8 Q Now, just to be clear, you talked about at
9 one point you were able to get \$5 CPMs. At what point
10 was that?

11 A I think the high point when I was getting
12 more national buys was about -- about mid-2006 was
13 when I started to see the highest -- and I get \$7, I
14 get \$14, I get \$2. I get -- all my buys -- every buy
15 comes in differently, you know, based on the
16 requirements: I only want to reach this, I want to
17 reach that. The more targeting, the higher the CPM.

18 But then I have to look at all the
19 impressions that I had to deliver and I'm looking at
20 an average CPM for all of those impressions and all of
21 that revenue, and that was \$5 in 2006. The last two
22 months it's been \$2.

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1 Q And do you know if this is a general industry
2 change or peculiar to Live365?

3 A Well, I'm quite confident it's general
4 industry because, as I was saying, 85, 90 percent of
5 my advertising comes from these networks. And these
6 networks, they don't go out and sell Walmart Live365.
7 They don't go out and sell it Yahoo!. They have --
8 like an example. I have a banner network called
9 ValueClick, and ValueClick goes to the market and they
10 say, would you like to buy an entertainment network?
11 We have 1,000 partners in our entertainment network.

12 And so they just sell the ValueClick
13 entertainment network, and the advertiser agrees to
14 pay a payment for the ValueClick entertainment
15 network, and all parties get the same CPM; they get
16 different amounts of money based on the amount of the
17 ads they can actually deliver.

18 So I used to have Ronning Lipset Radio, now
19 TargetSpot. They would take an order from -- for
20 example, today I have Walmart. And they would take an
21 order from Walmart, and I was -- in 2006 I was
22 20 percent of the RLR network. So everybody got the

1 \$5 CPMs. I got 20 percent of the money because I
2 could deliver 20 percent of the impressions. Yahoo!
3 got \$5, but they might have delivered 40 percent. I
4 don't know how much they did.

5 But we were all -- and, in fact, my contracts
6 with these ad networks require I have favored nation,
7 that I get the same rates that the other partners in
8 the network get. So if I'm getting 85, 90 percent of
9 my money through these networks and I'm getting the
10 same price everybody in the network is, I've got to
11 imagine that this is definitely an industry activity,
12 not something just unique to Live365.

13 Q Now, the advertising networks, do they charge
14 commissions?

15 A One of the changes I didn't make in my
16 statement here is I talked about commission. The
17 commission is pretty significant. When I was telling
18 you that I get \$2 or \$5 CPMs, that is the price the
19 advertiser is paying for the CPMs. But advertising,
20 as I mentioned, is a separate business from
21 webcasting, just like hosting is a separate business
22 from webcasting, and they have their business model.

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1 And I have put in my statement at the time
2 that these networks were charging 25 to 50 percent.
3 My ValueClick deal is 50 percent. My Tribal Fusion
4 deal is 40 percent. And I had a low 25 percent from
5 TargetSpot.

6 As the networks are becoming more powerful,
7 as more of the money is flowing through them, they
8 have the ability to come back to you and say, look, do
9 you want our money or not?

10 And I had, in January of this year, the
11 majority of my money comes from -- audio revenue comes
12 through a company called TargetSpot. And I had to
13 agree to -- in order to stay in the TargetSpot
14 networks, I had to agree to go from 25 to 40 percent.
15 So if they sell a \$2 CPM ad, my company -- the money
16 that I actually get is a little over a dollar.

17 So I'm getting -- no matter what the market
18 rate for CPM is, what the Internet radio company
19 gets -- and it's not just Internet radio; terrestrial
20 radio, everybody -- the advertising business takes a
21 chunk of it, the network takes a chunk. So the money
22 I have to work with to pay my bills is now -- I would

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1 say nobody is less than 40 percent in my ad networks.

2 So, yes, they do take a commission and
3 they're getting more demand -- they're getting
4 stronger in what they're requesting.

5 Q Mr. Floater, you mentioned the increase in
6 inventory. What effect does that have on the revenue
7 per hour of streaming by Internet radio companies?

8 A You are asking the --

9 Q Because of the increased inventory in the
10 market, what effect does that have on the revenue per
11 hour that's achieved by Internet radio companies such
12 as Live365?

13 A Well, the inventory per hour is based on how
14 many spots you can sell in every hour. And so the --
15 if the fill rate goes down, you get less per hour.

16 When my company couldn't support the cost of
17 the 20 million hours or the number of total hours,
18 what we did in order to maintain some -- close to the
19 same number is, you know, we went from five spots an
20 hour to ten spots per hour in order to maintain the
21 revenue per hour.

22 Q Do you sell subscriptions to stations that

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1 are streamed through Live365?

2 A Yes. Yes, we do.

3 Q And approximately what percentage of
4 Live365's aggregate tuning hours come from listening
5 by subscription subscribers, purchasers of
6 subscriptions?

7 A The -- well, Live365's audience, if I look at
8 all my streaming hours, I would -- 25 percent of those
9 hours are from subscribers, the passionate audience
10 that is willing to pay to support their stations.

11 Q And approximately what percent of the unique
12 visitors to the Live365 site are subscribers?

13 A Well, there's my problem, and that's what I'm
14 spending all my time trying to resolve, similar to how
15 we had to do it in public radio. I have not been able
16 to pass 2 percent of my audience to actually become
17 paid subscribers. And so I think that gives you a
18 little indication of how passionate the -- if you find
19 somebody who really loves a particular channel and if
20 1-1/2 percent of my audience are subscribers, but
21 they're generating 25 percent of my listening, that
22 gives me an idea that these subscribers and my

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1 subscription revenue is a very valuable way to help
2 pay for my operation.

3 Q And what does Live365 do to attempt to sell
4 more subscriptions?

5 A I constantly hear from our audience that we
6 do too much. You cannot go to the Live365 website
7 without the first hit on the home page, why don't you
8 become a subscriber? Become a VIP. Support your
9 station.

10 And so we -- you know, we introduce the
11 concept right when you hit our page.

12 I was telling you that I can't fill all my
13 inventory, my advertising inventory, my banners, my
14 audio spots with paid spots. And so to just not -- to
15 still have the interruption there to encourage
16 subscription, I fill those spots with promotional
17 spots. I do my own advertising in the unsold
18 inventory to say, become a subscriber.

19 We get -- people opt into newsletters about
20 the company and about webcasters and about artists,
21 and every one of the newscasters we pitch, become a
22 subscriber. We have a program with our broadcasters

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1 that if they can talk their mother or their friends or
2 other people into supporting their station and
3 becoming a subscriber, we commission them; we give
4 them 25 percent of the subscription for bringing in
5 subscribers. And so I use my broadcasters to help
6 sell subscriptions.

7 And I also have -- there are companies out
8 there -- it's affiliate relation companies, and I use
9 a company called Commission Junction. And these are
10 people that have web sites where people may be
11 interested in Internet radio, and I provide them
12 banners to put on their web sites. Maybe they're a
13 journalist, a music journalist or a blogger that has a
14 music site. I give them -- hey, become a subscriber
15 on Live365 banners, and I also share commission with
16 them to help sell my subscriptions.

17 So I have a combination of, you know,
18 affiliates and my own advertising, my newsletters,
19 and -- no one has ever been to a Live365 site without
20 having 1,000 pitches to become a member and support
21 their stations.

22 Q In recent years, have you observed any

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1 changes in your ability to sell subscriptions to
2 Live365?

3 A Well, again, I was telling you I have my own
4 data I look at. And we reached a peak in about 2007
5 with 57,000 subscribers that were paying. Of course,
6 that was on a larger visitor number that was coming to
7 the site.

8 When I wrote my statement, which must have
9 been about August of last year, I was down to 44,000.
10 And my report from last month shows I have about
11 40,000 subscribers now.

12 Q Now, Mr. Floater, I'd ask you to turn to
13 page 11 of your statement, the section titled, "The
14 benefits of aggregation."

15 A Okay. Uh-huh.

16 Q Can you define for the court, what is an
17 aggregator?

18 A Well, I think I wouldn't have to explain
19 aggregation, but I would explain it -- how Live365 is
20 referencing it in terms of our business. We are
21 combining thousands of individual small webcasters,
22 hobbyists, church groups, the jazz professor, the

1 symphony, that are -- many of them will never have the
2 kind of audience capability, just because of the type
3 of music that they play, to reach massive audiences.
4 So we have a concept that we are aggregating all these
5 stations into one directory, providing them one pack
6 of services.

7 So when I'm referring to aggregators, I'm
8 talking about bringing together thousands of small
9 webcasters under a single roof.

10 Q Are there benefits of aggregation service to
11 the webcasters?

12 A Yeah. Of course. That's why we do it. I
13 would say the benefits are, first, they receive access
14 to a lot more powerful tools than they could ever have
15 by themselves. A webcaster could not create an ad
16 insertion engine. The kind of webcasters that I deal
17 with -- the jazz professor, like I said, would never
18 be creating ad insertion, would never have play list
19 managers, may not be able to set up an e-commerce site
20 to be able to transact a subscription.

21 And so by aggregating them all together and
22 spreading the cost among all of them, they get access

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1 to tools that they would never have before. They get
2 access -- not only do they get the tools, but they get
3 promotional and marketing -- we help reach audiences
4 that they might not be able to do on their own by
5 putting them in a directory.

6 I know many of our webcasters that I've
7 spoken to that had their own little webcast site and
8 then came to Live365. They saw their audience and
9 their streaming grow because other people that were
10 listening to other stations found them. So there's
11 benefit to growing the audience which allows ability
12 to capture more revenue to pay their costs, from the
13 royalties to the bandwidth, et cetera.

14 And then the very core business of why any
15 cooperative comes together is buying services in bulk
16 obviously lowers the cost.

17 And my main concern in running a webcast
18 company like Live365 is to keep the cost of webcasting
19 down to where it allows for many more people to
20 participate in this business.

21 When I ran a terrestrial radio station, the
22 costs are millions of dollars to run an antenna and

1 the electric and all of that operation. I'm totally
2 excited about webcasting because, you know, I have
3 webcasters that can run a station for \$10 a month.
4 And if somebody can run a station for \$10 a month,
5 they can play Armenian music or folk or many other
6 types of music that terrestrial radio -- from
7 classical to jazz and whatever. It's not that the
8 terrestrial radio dislikes this music. It's just the
9 mass audience requirements to raise millions of
10 dollars in advertising to support those services are
11 not there with those kind of music segments.

12 And by aggregating stations and keeping their
13 costs low from Internet radio, you're opening the door
14 to having many more types of music on the air which
15 is, I think, our purpose of Live365 and one of the
16 benefits of aggregating them together.

17 Q Do you see benefits of aggregation to
18 copyright holders?

19 A Well, I think the one I just hit that's a
20 benefit to different types of broadcasters is shared
21 by the copyright owners. If only popular music -- if
22 only rock was on the radio, then the massive amounts

1 of the creative community, people that are creating
2 all kinds of different kinds of music would not have a
3 place to be heard. And so the exciting thing about
4 Internet radio is it's expanding the opportunity for
5 all kinds of artists and all kinds of music, not just
6 the six or seven genres that had been on terrestrial
7 radio.

8 So one of the benefits is access to the
9 airwaves -- in a sense, the Internet airwaves -- for
10 many, many more types of artists than were allowed
11 previously -- not allowed, but were previously
12 possible in the economics of terrestrial radio.

13 Aggregating all the stations allows us to
14 generate revenue by selling this large package of
15 advertising that a single station could not sell. Any
16 of my individual webcasters could not sign up for
17 ValueClick or TargetSpot because they're bringing
18 2,000 hours a month and the TargetSpots don't want to
19 deal with them. But when I put 5,000 2,000-hour
20 stations together, I can go to TargetSpot and make a
21 deal so I can generate revenue for artists through
22 royalties.

1 And I think royalties -- if I'm an artist,
2 royalties is nice, sound recording royalties is nice,
3 but for most of my artists, they're probably not
4 hitting the \$10 minimum to receive a royalty check.

5 So -- and why -- we've talked earlier about
6 these agreements where they waive the royalties
7 because, first and foremost, the artist has to be
8 heard, and they can -- you can buy the download, you
9 can find out about the artist, you can buy a ticket to
10 one of their performances. And so artists benefit by
11 being heard and by having alternative revenue streams
12 besides just royalties. And they have a chance to
13 earn royalties.

14 And so I think that's one of the -- there's a
15 wider range for artists to participate, there are many
16 more artists, there's more chances for them to get
17 promotion, more chances to get revenue from royalties
18 and other sources.

19 MR. OXENFORD: Your Honor, I have no further
20 questions. The witness is available for
21 cross-examination.

22 CHIEF JUDGE SLEDGE: Any cross-examination?

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1 MR. DeSANCTIS: Yes, Your Honor. Could I ask
2 that we take our morning recess before I start?

3 CHIEF JUDGE SLEDGE: We've only been going --
4 all right. We'll recess ten minutes.

5 MR. DeSANCTIS: Thank you very much, Your
6 Honor.

7 (Whereupon, a short recess was taken.)

8 CHIEF JUDGE SLEDGE: Thank you. We'll come
9 to order. Mr. DeSanctis?

10 CROSS-EXAMINATION

11 BY MR. DeSANCTIS:

12 Q Good morning, Mr. Floater.

13 A Good morning.

14 Q You are the general manager of media at
15 Live365, Inc.; is that correct?

16 A That's correct.

17 Q And Mr. N. Mark Lam is the CEO of Live365,
18 Inc.; is that correct?

19 A That is correct.

20 MR. DeSANCTIS: May I approach the witness?

21 Your Honors, what I have just handed out and
22 what is before the witness is the sworn deposition

1 testimony of Mr. Mark Lam, and I -- at this time I
2 would like to move for its admission into evidence. I
3 think it is perfectly admissible under the Federal
4 Rules of Evidence, the Federal Rules of Civil
5 Procedure, as well as the rules of this court.

6 The rules of this court, Rule 351.10 as well
7 as Federal Rule of Evidence 402 provide that all
8 evidence that is relevant and not unduly repetitious
9 or privileged shall be admissible. In turn, Your
10 Honor, Federal Rule of Civil Procedure 32(a)(3)
11 provides that an adverse party may use for any purpose
12 the deposition of a party or anyone who, when deposed,
13 was the party's officer, director, managing agent or
14 designee.

15 CHIEF JUDGE SLEDGE: That cite again.

16 MR. DeSANCTIS: That is Federal Rule of Civil
17 Procedure 32(a)(3). It is not hearsay, of course,
18 because it is the admission of a party opponent, and
19 admissions of a party opponent, when used against that
20 party -- which in this case is Live365 Inc. -- are not
21 hearsay. And finally, I would cite the court -- that,
22 of course, is from Rule of Evidence 801.

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1 And I would cite the court, finally, to
2 5 Wigmore on Evidence, section 1415 at page 243.
3 Quote, every statement of an opponent may be used
4 against him as an admission without calling him. The
5 opponent's sworn statement, though called a
6 deposition, is no less an admission than any other
7 statement of his.

8 Here, the party is Live365. Mark Lam is
9 their CEO. The deposition was taken under oath. His
10 counsel was present and had the opportunity to ask
11 questions. I think under the rules of this court and
12 under the Federal Rules of Evidence as well as the
13 Federal Rules of Civil Procedure, the deposition is
14 admissible at this time.

15 I'll note for the record that there is a
16 short redaction in it at which point terms that are
17 not relevant to this proceeding were discussed, and at
18 this time, I'd move for its admission.

19 JUDGE ROBERTS: Where is that, Mr. DeSanctis?

20 MR. DeSANCTIS: It's just a couple of pages,
21 Your Honor, at page 151 -- I'm sorry, it's more than a
22 couple. It's 151 through 154. And there's a

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1 two-and-a-half -- three-and-a-half-line redaction on
2 page 74. This is our exhibit --

3 JUDGE ROBERTS: Are these redactions because
4 of statements made with respect to non-precedential
5 agreements?

6 MR. DeSANCTIS: Yes, they are, Your Honor.
7 We also have a short bench memo going over the rules
8 and arguments that I just made orally, if Your Honors
9 would wish to see it.

10 CHIEF JUDGE SLEDGE: Mr. DeSanctis, you've
11 heard me say before, so I'll bore you with repetition,
12 we don't dare suggest to counsel how they proceed.
13 Your expertise and compensation is supposed to greatly
14 exceed ours, and we would not make that presumption.

15 MR. DeSANCTIS: If I may approach the bench,
16 Your Honor, I would like to hand Your Honors the
17 written bench memo that we prepared, the original of
18 which will be filed today in the clerk's office. I'm
19 not marking it as an exhibit because it's simply legal
20 argument.

21 CHIEF JUDGE SLEDGE: All right.

22 MR. DeSANCTIS: Thank you, Your Honor.

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1 CHIEF JUDGE SLEDGE: Anything else?

2 MR. DeSANCTIS: No, Your Honor.

3 CHIEF JUDGE SLEDGE: Any response?

4 MR. OXENFORD: Yes. Your Honor, we object to
5 the admission of this testimony on cross-examination.
6 SoundExchange is limited to examination relating to
7 the matters provided on direct. We did not offer the
8 direct statement of Mark Lam. The testimony that he
9 may or may not have given at his deposition -- or I
10 guess that he may have given at his deposition -- is
11 irrelevant because his direct testimony is not here.
12 Mr. Floater has not testified in any way as to the
13 statements made by Mr. Lam at his deposition.

14 We simply see no relevance to admitting
15 deposition testimony of a witness that has not been
16 offered by Live365 in evidence in this proceeding.

17 CHIEF JUDGE SLEDGE: Mr. Malone?

18 I'm sorry. Were you through.

19 MR. OXENFORD: In addition, Your Honor,
20 offering the entire deposition testimony of a witness,
21 including all objections, including all matters that
22 were deemed irrelevant or objected to as being

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1 irrelevant is, in addition, unduly prejudicial as well
2 as irrelevant. Thank you.

3 CHIEF JUDGE SLEDGE: If you offered a portion
4 of it, aren't you required to offer all of it?

5 MR. OXENFORD: Well, Your Honor, again, we
6 don't see that offering the entire deposition --

7 CHIEF JUDGE SLEDGE: That's not my question.

8 MR. OXENFORD: In the normal situation, a
9 deposition would be used to impeach a witness. It
10 would be used to show a witness that he had not made
11 certain statements. That's not what it's being used
12 for here. It's being used as evidence. And, at this
13 point, SoundExchange is not presenting its direct
14 case. They are cross-examining the witness of
15 Live365. The only witness before the court is
16 Mr. Floater. So putting in the examination of Mr. Lam
17 is irrelevant for that purpose.

18 CHIEF JUDGE SLEDGE: By failing to respond
19 twice, I'm assuming you're not willing to answer the
20 question?

21 MR. OXENFORD: Certainly, you would have to
22 put in the entire deposition if it was admissible so

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1 that the entire context of the question was relevant.

2 CHIEF JUDGE SLEDGE: Mr. Malone?

3 MR. MALONE: If Your Honor please, the
4 Intercollegiate Broadcasters takes no position on
5 whether the exhibit is admissible or not. But if it
6 is admitted, then it should be admitted for all
7 purposes available to all parties and not just
8 admissible for use against the deponent.

9 CHIEF JUDGE SLEDGE: That's the way it was
10 offered as evidence.

11 MR. MALONE: Thank you, Your Honor.

12 CHIEF JUDGE SLEDGE: Anything further,
13 Mr. DeSanctis?

14 MR. DeSANCTIS: Just to respond briefly to
15 some of the points raised by Mr. Oxenford. I find it
16 remarkable, after having withdrawn Mr. Lam's
17 testimony, today for him -- for Mr. Oxenford to argue
18 that SoundExchange can't offer the deposition into
19 evidence per the federal rules unless we're -- I
20 believe the argument was unless I'm impeaching
21 Mr. Floater with it.

22 I am not offering it to impeach the testimony

1 of Mr. Floater, which may or may not make sense under
2 the circumstances. I am offering it as evidence.
3 This is our opportunity to put it in as evidence.
4 They're the ones, after putting through our paces
5 deposing him, preparing our case against him, to have
6 withdrawn him at the last minute. And there may or
7 may not be an opportunity to put it in evidence in our
8 rebuttal case because, again, he's going to say it
9 would only be fair to rebut Mr. Lam's testimony which
10 has been withdrawn.

11 The rules are very clear that this is
12 admissible for any purpose. That's sort of the key
13 phrase in Federal Rule of Civil Procedure 32(a)(3),
14 not just for the purposes that Mr. Oxenford wants to
15 limit us to. So I stand on my prior statements.

16 JUDGE ROBERTS: Mr. DeSanctis, when did you
17 become aware that Mr. Lam was not going to testify?

18 MR. DeSANCTIS: That was this Saturday night
19 at about 9:30.

20 JUDGE ROBERTS: p.m.?

21 MR. DeSANCTIS: p.m., yes. We received an
22 e-mail from Mr. MacDonald to that effect which was the

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1 first any of us had heard.

2 CHIEF JUDGE SLEDGE: Do I correctly
3 understand your statement that the offer of this
4 exhibit at this time has nothing to do with beginning
5 your cross-examination of Mr. Floater and is unrelated
6 to your cross-examination of Mr. Floater?

7 MR. DeSANCTIS: I may use it in the
8 examination of Mr. Floater, but I wasn't offering it
9 at this time as impeachment for Mr. Floater's
10 testimony per se, which is what Mr. Oxenford said is
11 the only ground I can do it on, and I think that's
12 directly contravened by the federal rules. I am
13 simply offering it into evidence as an admission of a
14 party opponent, that party being Live365, Inc. This
15 is their statement that is evidence in chief.

16 CHIEF JUDGE SLEDGE: We'll recess, and it may
17 be -- if we're not able to come back before noon,
18 we'll notify you of that and tell you that we'll
19 recess for an hour.

20 MR. OXFORD: Your Honor, we'd offer the
21 opportunity to put in a reply brief to their testimony
22 as well -- or their briefing as well.

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1 (Whereupon, a short recess was taken.)

2 CHIEF JUDGE SLEDGE: Thank you. We'll come
3 to order. Notwithstanding Mr. DeSanctis' response, it
4 appears to us that this offer is not part of the
5 cross-examination of this witness and is something
6 separate from that and that cross-examination can
7 proceed. And anticipating that it might arise at some
8 point soon, Live365 should present any response to the
9 memorandum presented by SoundExchange by the beginning
10 of court tomorrow. At this time, the -- well, we'll
11 defer ruling on the offer at this time.

12 BY MR. DeSANCTIS:

13 Q Mr. Floater, you discussed in your written
14 testimony and on direct examination that Live365 has a
15 broadcaster service and a webcasting service; is that
16 correct?

17 A A broadcasting service and an Internet radio
18 service, yes.

19 Q And you described the Internet radio service
20 as that side of Live365's business by which Live365
21 actually transmits the performances of sound
22 recordings and other things over the Internet,

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1 correct?

2 A Correct.

3 Q And you describe the broadcaster service as
4 Live365's provision of services, so to speak, to the
5 Live365 webcasters; is that correct?

6 A Yes.

7 Q And that includes storage space on Live365
8 servers, correct?

9 A That includes -- yes.

10 Q These are the services that Live365 provides
11 to its webcasters through what you call the
12 broadcaster service?

13 A You know, when you say to the Live365
14 broadcasters, Live365 provides hosting and broadcast
15 services to number of broadcasters or webcasters. Not
16 all of them are in the Internet radio side of the
17 company that I service, but somebody who is taking the
18 Live365 webcasting or broadcasting services can be
19 listed in my directory that I then try to generate
20 advertising and subscription revenues, but they are
21 not required to.

22 CHIEF JUDGE SLEDGE: I'm very confused.

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1 Broadcasting services are offered to webcasters?

2 THE WITNESS: Yes.

3 CHIEF JUDGE SLEDGE: In your earlier
4 testimony, when you were saying broadcasting, I
5 assumed you were talking about broadcasters. So this
6 is different than what I understood you to be talking
7 about before?

8 THE WITNESS: My -- my apologies. To make a
9 clarification, the act of streaming, whether it comes
10 from a satellite or an antenna or over IP, to me,
11 radio -- these are distribution technologies, but they
12 are all radio, they are all -- in my world, I consider
13 this all broadcasting.

14 So when I was referring to broadcast
15 services, I mentioned things like hosting and
16 streaming and play list managers and ad insertion and
17 e-commerce subscription managers. All of those type
18 of services that we provide to our webcasters I refer
19 to as broadcast services. But these are -- these are,
20 you know -- for the clarification, Your Honor, I view
21 these people as broadcasting.

22 JUDGE ROBERTS: And this is the side that you

1 described as being where you operate as an aggregator,
2 correct?

3 THE WITNESS: Both sides of the company
4 aggregates services. So on the -- what I had in my
5 statement as broadcast services, these hosting and
6 streaming services, are aggregated to lower their
7 cost. We buy bandwidth in 5 million-hour blocks
8 rather than in 2,000-hour blocks that an individual
9 webcaster would have to buy. So that -- the
10 aggregation of those services. When we develop ad
11 insertion technology, we provide it for all of the
12 webcasters, and so those services are all aggregated
13 to provide them cost-effective.

14 And on my Internet radio side, putting all of
15 the audiences together, all the station content
16 together, allows me to sell advertising for the group
17 of them, so their revenue generation capabilities on
18 the Internet radio side are also benefiting from the
19 concept of aggregation.

20 CHIEF JUDGE SLEDGE: Mr. Floater, I
21 appreciate that it's difficult to change one's
22 mindset, but your unique definitions are very

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1 confusing to everyone else here. So if you can direct
2 your terminology for broadcasting to apply to
3 broadcasters and webcasting to apply to digital
4 transmissions, it will be much more clear to those
5 that are listening to you.

6 THE WITNESS: I will try to do that. My
7 sincerest apologies.

8 BY MR. DeSANCTIS:

9 Q Mr. Floater, these -- I'm trying not to use
10 the word "broadcast" in order to not confuse the
11 record --

12 CHIEF JUDGE SLEDGE: That's what he calls
13 them.

14 BY MR. DeSANCTIS:

15 Q It's true, isn't it, Mr. Floater, that all of
16 the Live365 webcasters who appear on the Live365
17 website use these broadcaster services that you sell
18 them, correct?

19 A The stations that are in the Live365 Internet
20 directory, they -- some of them use all of the
21 services, these webcasting services that we provide,
22 all of them -- say all of them would use the streaming

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1 services. Although I provide ad insertion, play list
2 management, the music licensing, not all of the
3 stations use those -- they all uses those services;
4 not all of them use those services from Live365.

5 So some of our webcasters may go out and use
6 RCS, another company that provides play list managers,
7 and some of them may use Ando for their ad insertion
8 technology. But -- I provide those similar services,
9 but that's an offering the stations can take advantage
10 of or not.

11 JUDGE ROBERTS: Mr. Floater, what do you have
12 to take from Live365 in order to be -- there's got to
13 be basic things that you have to take from Live365.

14 THE WITNESS: The core thing that you take is
15 our streaming.

16 JUDGE ROBERTS: Bandwidth.

17 THE WITNESS: The bandwidth that you come
18 through our service at this point.

19 JUDGE ROBERTS: And that's required of
20 everyone?

21 THE WITNESS: Yes.

22 JUDGE ROBERTS: And that's the only thing

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1 that is required of everyone? The other services that
2 you offer are optional?

3 THE WITNESS: Yes, I would say the other
4 services are optional. I would say the majority take
5 it because of the cost benefits, but I have broad --
6 webcasters that use a variety of other services, yes.

7 JUDGE WISNIEWSKI: Mr. Floater, you confused
8 me, actually, now, because you talk about the folks
9 that are in the directory as being part of your
10 Internet radio service. And you talk about them --
11 that all of those that are in the Internet directory
12 use Live365 streaming services, is what you said.

13 THE WITNESS: The actual streaming of the
14 content from our servers to the audience, they all use
15 that, yes.

16 JUDGE WISNIEWSKI: But at one point you
17 indicated that they may not get their license to
18 stream through Live365. Were you correct in that
19 statement?

20 THE WITNESS: When you refer to their
21 license, are you referring to music licensing, Your
22 Honor?

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1 JUDGE WISNIEWSKI: Yes.

2 THE WITNESS: Yes. They do not all secure
3 music license -- they do not all utilize the ASCAP,
4 BMI, SESAC and SoundExchange licensing of Live365.
5 Some of them are college radio stations that have
6 opted into the SoundExchange non-commercial
7 educational stations or other small webcaster
8 offerings that are available through SoundExchange.
9 So they do not have to use my licensing. Some of them
10 just use the Live365 streaming services.

11 JUDGE WISNIEWSKI: But if you're streaming on
12 their behalf, you're the one transmitting, aren't you?

13 THE WITNESS: I'm the one transmitting, yes.

14 JUDGE WISNIEWSKI: Under the law.

15 THE WITNESS: I am the one streaming the
16 transmissions, yes.

17 JUDGE WISNIEWSKI: Then it ought to occur
18 under your license, shouldn't it?

19 THE WITNESS: Well, I would ask -- I require
20 these stations to provide proof of certification that
21 they stream. If I see a number of stations in the
22 iTunes directory or on the SHOUTcast platform from

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1 AOL, these stations listed in their directory stream
2 by their services, they do not even enter into the
3 royalty licensing that I know of. So all of those
4 stations are required to provide their own licensing.

5 And, similar to Live365, if a station comes
6 to me and, you know -- or if you go to -- if you go to
7 Stream the World, Stream the World or Stream Guys or
8 Akamai may provide the vast majority of streaming
9 going on. They provide the servers. They are doing
10 the transaction [sic] of the content to the audience.
11 None of those companies that I know of have any
12 royalty licensing.

13 JUDGE WISNIEWSKI: Well, in that case, are
14 those companies, and yourself when you act in that
15 manner, are they acting as an agent for the webcaster?

16 CHIEF JUDGE SLEDGE: I'm sorry. Which
17 companies?

18 JUDGE WISNIEWSKI: The stations that have
19 come to you.

20 MR. OXENFORD: Your Honor, if I just might --
21 the witness is not an attorney. To some degree, I
22 believe your questions ask for legal conclusions that

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1 the witness may not be able to provide.

2 JUDGE WISNIEWSKI: That's fair. Thank you.

3 BY MR. DeSANCTIS:

4 Q Mr. Floater, we established that all
5 webcasters use at least some of your broadcast
6 services, correct?

7 A Yes.

8 Q The streaming services?

9 A Yes. And to -- for clarification for the
10 court, they use our webcast services.

11 Q Okay.

12 JUDGE WISNIEWSKI: By the way, I have to
13 comment, Mr. Oxenford, in your opening statement --
14 essentially, the witness' testimony is contradicting
15 your opening statement. In your opening statement, I
16 had specifically asked you whether or not Live365 was
17 the -- the service that was responsible for streaming
18 and, therefore, was the license service that we were
19 talking about in this proceeding, and you had
20 indicated they were.

21 MR. OXFORD: Your Honor, for those services
22 that do not separately license, yes, in fact, Live365

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1 is the service that is relying on the statutory
2 license, just like --

3 JUDGE WISNIEWSKI: That is the only service
4 that we had before us in this proceeding. We do not
5 have these other services before us in this
6 proceeding.

7 MR. OXENFORD: That's correct.

8 JUDGE WISNIEWSKI: Okay. Thank you.

9 BY MR. DeSANCTIS:

10 Q Okay. Mr. Floater, so we established that
11 all of your Live365 webcasters use some of your
12 broadcast services which you've just called webcasting
13 services. Most of your -- of the Live365 webcasters
14 actually use many more of the broadcasting services
15 that Live365 offers, correct?

16 A Yes, they do.

17 Q And the webcasters pay Live365 for these
18 services, correct?

19 A Yes, they do.

20 Q And included in the fee that the webcaster
21 pays to Live365 is an approximation of the royalties
22 that each webcaster would owe to SoundExchange,

1 correct?

2 A Live365's business requires the coverage of
3 all the costs of webcasting, and that includes
4 streaming and hosting and technology and, in the
5 case -- royalties if they are using the webcasting --
6 if they are using the royalty licensing part of
7 Live365, then, yes, those -- their fees would be an
8 estimate of the use of that license.

9 Q And most of Live365's webcasters take
10 advantage of Live365's offer, so to speak, to pay the
11 royalties for them, correct?

12 A Yes.

13 Q So most of your webcasters are paying Live365
14 to pay the royalties to SoundExchange, correct?

15 A The -- I don't know if it's paying Live365 to
16 pay the royalties. They are paying for their
17 services. The royalties are resulting from streaming
18 of the performances to the audiences and, when that
19 transaction takes place, Live365 pays those royalties.

20 Q Well, hang on. But there are broadcaster
21 packages that you make available to your webcasters
22 that do not include Live365 paying the royalties,

1 correct?

2 A Yes.

3 Q Okay. And in those packages, the Live365
4 webcaster has to pay its own royalties to
5 SoundExchange, correct?

6 A If they are using copyrighted content that
7 they do not own or have directly licensed.

8 Q Isn't it true that Live365 actually requires
9 a webcaster to purchase the level of service that
10 includes Live365 paying the royalty if the webcaster
11 is going to stream any music to which it doesn't own
12 the license?

13 A Live365 requires that all broadcasts have --
14 they have secured the rights to their material,
15 whether they own it, they've licensed it somewhere
16 else, they have a direct license with SoundExchange or
17 with the copyright owner, or they use the Live365
18 license.

19 CHIEF JUDGE SLEDGE: The question was about
20 webcasting.

21 THE WITNESS: Webcasting, yes.

22 CHIEF JUDGE SLEDGE: Your answer was about

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1 broadcasting.

2 THE WITNESS: Yes. Once again, my apologies.

3 CHIEF JUDGE SLEDGE: Answer the question as
4 he asks it.

5 THE WITNESS: Yes, the webcasters at Live365
6 that -- webcasts are required to have the rights to
7 webcast their performances. And whether they have the
8 license to do that because they own the content,
9 because they've directly licensed the content, because
10 they have an alternative license with SoundExchange or
11 they want to leverage the Live365 license and be in
12 the Live365.com license, they all are required to have
13 a license for the content.

14 BY MR. DeSANCTIS:

15 Q Isn't it true that the two -- that the two
16 packages you offer to webcasters are referred to by
17 Live365 on its website as the royalty included package
18 and the standard package? Correct?

19 A First of all, I do not run the broadcast
20 services of the company. And so I can give you some
21 comments and some general information by being in the
22 company and seeing some of this stuff, but I did not

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1 design the packages or -- my role in the company is
2 the generation of advertising and subscription revenue
3 from the audiences that are streaming in our
4 Live365.com.

5 Q Well, you described the broadcast services in
6 your written testimony and in your direct, right?

7 A Yes. I know that the company offers those
8 webcast services to webcasters.

9 Q Perhaps it would help if I used an exhibit.
10 MR. DeSANCTIS: If I may, Your Honor.

11 CHIEF JUDGE SLEDGE: Yes, sir.

12 BY MR. DeSANCTIS:

13 Q Mr. Floater, you're familiar with the Live365
14 website, correct?

15 A Yes, I am. Especially the components that
16 I'm responsible for of the genre listings and the
17 search engines and the players that I showed in my
18 materials, yes.

19 Q Right. So one of the exhibits to your
20 written testimony is a page from the Live365 website,
21 correct?

22 A From the -- if you go to the Live365 website,

1 it's divided into listening and broadcasting. And I'm
2 responsible for the listening side, yes.

3 Q I should clarify that the exhibit that is
4 Exhibit 2 to your written direct testimony, you
5 actually authored that web page, right? What appears
6 on the page, on the exhibit, is not actually how the
7 page appears on the website.

8 A The Exhibit 2, if I remember, was the actual
9 players that appear, and the only change I mentioned
10 is that I put a little red arrow of the "buy" button.

11 Q Okay. So you just described that, on the
12 Live365 website, there is a broadcaster button that a
13 user can go to, correct?

14 A A broadcaster tab, yes, uh-huh. And for the
15 purposes of this court, it would be -- it is meant to
16 be webcasts.

17 Q Okay. What has been marked as Trial -- as
18 SoundExchange Trial Exhibit 14 for identification at
19 this point is, in fact, page prints from the
20 Live365.com website, correct?

21 A Yes, it seems to be.

22 MR. DeSANCTIS: Your Honor, at this point,

1 I'd like to move for the admission of SoundExchange
2 Trial Exhibit 14.

3 MR. OXENFORD: Your Honor, I'm not sure of
4 the relevance. This doesn't appear to be within the
5 scope of Mr. Floater's testimony, professional
6 services offered by Live365 to webcasters paying their
7 own royalties.

8 CHIEF JUDGE SLEDGE: Mr. DeSanctis?

9 MR. DeSANCTIS: Sure, Your Honor, in
10 paragraph 7 of the written direct testimony,
11 Mr. Floater describe what he calls there the broadcast
12 services, which is what we're talking about here. He
13 goes on to describe, at paragraph 10 and elsewhere in
14 his testimony, what their royalty payments to
15 SoundExchange are and what they are as a percentage of
16 their revenue.

17 And you'll see what here -- has shown is
18 where that revenue is actually coming from. And in
19 footnote 2 to his testimony on page 6, he states that
20 Live365 pays royalties for the streaming performances
21 by most of its webcasters under Live365's statutory
22 performance license. And I am probing how that works.

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1 CHIEF JUDGE SLEDGE: That was page 6?

2 MR. DeSANCTIS: I'm sorry. Yes, that was
3 page 6, footnote 2, where the statutory performance
4 license payments is directly discussed, and I think I
5 have a right to probe how that works. Particularly
6 because Mr. Floater just testified that, although it's
7 in his testimony, it may not be his area of expertise
8 within the company, I'm using a document to guide us
9 through the question.

10 CHIEF JUDGE SLEDGE: Mr. Oxenford?

11 MR. OXFENFORD: Again, I don't think
12 Mr. DeSanctis has clarified the relevance of this to
13 the witness' testimony or the issue that we're here to
14 decide, the statutory webcasting where Live365 is
15 paying for the webcasters that it streams. The
16 evidence that Mr. DeSanctis is providing here is for
17 the professional broadcasters that pay their own
18 royalties as noted in footnote number 6.

19 MR. DeSANCTIS: No, that's actually
20 absolutely wrong, Your Honor.

21 CHIEF JUDGE SLEDGE: Well, that's all right.
22 The witness has testified about that portion of

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1 Live365's business -- that is, the broadcasting
2 service which he says, under his unique definition,
3 means services provided to webcasters. The exhibit
4 refers to the portion of Live365's business which is
5 broadcasting services. The objection is overruled.
6 The exhibit is admitted.

7 (SoundExchange Trial Exhibit Number 14 was
8 received into evidence.)

9 MR. DeSANCTIS: Thank you, Your Honor.

10 BY MR. DeSANCTIS:

11 Q So, Mr. Floater, let me start -- page 1 of
12 SoundExchange Trial Exhibit 14 is a page from the
13 professional broadcasting services of Live365,
14 correct?

15 A Yes. If you're telling me that you pulled
16 this off the website, then that would be the page from
17 the website, yes.

18 Q The second -- the third paragraph of text
19 begins, Live365 offers full royalty licensing coverage
20 for SoundExchange, and then goes on. Do you see that?

21 A Yes, I do.

22 Q So it's true, is it not, that Live365 does,

1 in fact, offer the royalty licensing coverage for what
2 Live365 calls professional broadcasters?

3 A Yes.

4 Q Okay. I just wanted to clear that up before
5 we get into the document. And I asked you earlier,
6 you'll recall, that there are two categories of
7 packages that Live365 offers to its webcasters as part
8 of its broadcast service. One category Live365 refers
9 to as royalty included and the other it refers to as
10 standard, correct?

11 A If those are the terms, royalty included --

12 Q Why don't you look at the second to last page
13 of the exhibit. Do you see in the middle of the page,
14 "'Royalty included' listening hours"?

15 A Yes.

16 Q These are packages that Live365 provides to
17 what it calls professional broadcasters which are
18 really webcasters, correct?

19 A Correct.

20 Q And these packages include the service by
21 which Live365 pays the broadcasters' performance
22 royalties to SoundExchange, correct?

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1 A These webcasters that, when streamed through
2 Live365, the performances are counted and tracked for
3 licensing and payment to the ASCAP, BMI, SESAC and
4 SoundExchange, yes.

5 Q And if the webcaster does not want Live365 to
6 pay its performance royalties for it, it can choose
7 the standard -- one of the standard packages, correct,
8 which appear on the last page of the exhibit?

9 A That would be my understanding, yes.

10 Q Okay. And those rates for the standard
11 packages are less than the rates for the royalty
12 included packages, correct?

13 A The standard packages are based on the number
14 of simultaneous listeners that go to the stations.

15 Q Right.

16 A The other packages are based on the listening
17 hours to the station. So I -- you know, I don't know
18 if it's less, more. There's different prices based on
19 different services.

20 Q Well, the royalty included packages are based
21 on listening hours --

22 A Uh-huh.

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1 Q -- So that the packages can be calibrated to
2 the number of listening hours in a particular -- that
3 a particular webcaster will stream through Live365's
4 service, correct?

5 A Yes. The broadcast team, if there is
6 additional costs for those services, then those -- I
7 would imagine the broadcast team is adding the pricing
8 to cover those costs as well.

9 Q Okay. And the more listening hours, the more
10 royalties that those listening hours are likely to
11 generate that would be owed to SoundExchange, correct?

12 A That -- yes.

13 JUDGE WISNIEWSKI: Well, now I'm confused
14 again, Mr. Floater, looking at these numbers. Perhaps
15 you can look at them and explain them to me a little
16 better than what we've just went through. Let's look
17 at the royalty included number first on the first
18 page.

19 THE WITNESS: Uh-huh.

20 JUDGE WISNIEWSKI: There's an introductory
21 rate of 107 for something called intro. I assume
22 that's short for introductory rate; is that correct?

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1 THE WITNESS: I would believe that that's
2 what they are referring to, Your Honor.

3 JUDGE WISNIEWSKI: If you turn the page,
4 you'll see there is a monthly intro rate for that up
5 to 64K, again, of \$75; is that correct?

6 THE WITNESS: Right.

7 JUDGE WISNIEWSKI: And so that's a lower
8 number in the standard package for the intro?

9 THE WITNESS: Both intro packages are not
10 identical, but --

11 JUDGE WISNIEWSKI: Well, that's the question
12 that I'm asking you, because if we go on, then, to
13 under the up to 64K, if we go up to, say, the large
14 category, you've got 297 for the royalty included and,
15 for the standard, you've got \$600. So in this case,
16 the standard is a higher price than the royalty
17 included. Do you see where I'm talking about?

18 THE WITNESS: The 64K -- 64K for which?

19 JUDGE WISNIEWSKI: Large.

20 THE WITNESS: Large was 297 on royalty
21 included.

22 JUDGE WISNIEWSKI: And if you turn to the

1 next page, it seems to be \$600 under the standard
2 package. So, under the standard package, it would
3 actually cost you more than under the royalty included
4 package. And I take it you're saying that's because
5 they just have different things in them; is that
6 correct?

7 THE WITNESS: Yes.

8 JUDGE WISNIEWSKI: So these two lines aren't
9 comparable?

10 THE WITNESS: Exactly.

11 JUDGE WISNIEWSKI: Okay. Thank you.

12 BY MR. DeSANCTIS:

13 Q Now, Mr. Floater, separate from what Live365
14 calls its professional --

15 JUDGE WISNIEWSKI: Well, perhaps we should
16 get some additional clarification. Can you tell me
17 why they're not comparable?

18 THE WITNESS: The -- I would say the first
19 difference is one is the amount of bandwidth that's
20 required for the two different packages. The
21 bandwidth cost of a large package for 5,000 hours is X
22 amount of cost. 5,000 hours you're streaming that

1 much.

2 The -- if I'm looking at the standard
3 package, there is no limit on the number of hours.
4 There is just that you could have 300 people at any
5 one time, and if you had 300 people 24 hours a day,
6 the amount of hours would be a lot more significant.

7 I would imagine that they -- they've measured
8 these kind of things for how much hours there are in
9 300 people and have tried to adjust the price to cover
10 their cost for that.

11 JUDGE WISNIEWSKI: Thank you, sir.

12 I'm sorry, Mr. DeSanctis. I just thought it
13 would be useful to --

14 MR. DeSANCTIS: Obviously, no apologies
15 necessary.

16 BY MR. DeSANCTIS:

17 Q Now, separate and apart, Mr. Floater, from
18 what Live365 calls its professional broadcast
19 services, what we've just been looking at, it also has
20 something they called their customer or consumer
21 broadcast services, correct?

22 A Correct.

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1 Q Okay. And that differs from the
2 professionals in the sense that the consumer broadcast
3 services is for individuals, like you and me, correct,
4 whereas the professional services is for corporations
5 or radio stations or that kind of thing?

6 A The major difference, as it affects my area
7 of the company, is that the professional services want
8 to manage their own identity and control a lot of
9 their own imaging in the station, their own branding
10 in the station, and I do not get the opportunity to
11 generate revenues from advertising in those packages.

12 So a professional package ends up -- the cost
13 of broadcasting is the same whether you're a
14 professional, whether you're an individual or whether
15 you're a corporation. It's the same cost of
16 broadcasting.

17 In the consumer packages, those broadcasters
18 allow me to sell the advertising in their packages,
19 which helps cover that fixed cost of broadcasting and,
20 therefore, those packages can be priced less than if I
21 can't generate some of the revenue by selling their
22 advertising.

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1 Q Okay. But the rates you charge for the
2 consumer broadcasting services also covers the
3 royalties generated by their webcasting that is owed
4 to SoundExchange, correct?

5 A The majority, if not all, of the consumer
6 broadcasters do leverage the Live365 SoundExchange
7 license for streaming.

8 Q In fact, all of the packages that you offer
9 to consumers come with it, correct?

10 A Yes.

11 Q I just showed you, Mr. Floater, what's been
12 marked as SoundExchange Trial Exhibit 15 for
13 identification purposes at this point. Do you see
14 that?

15 A I do.

16 Q This is a printout showing the broadcasting
17 packages that Live365 makes available to consumers,
18 correct?

19 A The personal broadcasting -- yeah, they're
20 separate, uh-huh. Yes, I believe this is.

21 Q On the second page of the exhibit, the first
22 row across the top shows that all of the packages you

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1 offer to consumers involve Live365 paying the
2 royalties owed to SoundExchange and other PROs,
3 correct?

4 A That's what's checked here, yes.

5 Q Isn't it true also, Mr. Floater, that for
6 the -- for your webcasters, you require them to
7 purchase a package under which Live365 pays the
8 royalties to SoundExchange and other PROs even if
9 there's just -- if they play just one song containing
10 copyrighted music that the webcaster him or herself
11 doesn't own the copyright to?

12 A First of all, the separation of broadcast and
13 Internet radio aspects of the company was put into my
14 statement to clarify which part of the company and
15 which part of my role was as head of the media side,
16 the streaming. So you're asking many questions about
17 the design of the packages and the licensing that the
18 broadcast side of the company offers that you're
19 asking me to speculate from my general company
20 knowledge or what I'm being shown here about the
21 website.

22 So I -- I will do my best to express what I

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1 know about the situation, but I can't say with
2 certainty that the design of these certain packages or
3 anything for the price and that -- I'm explaining, you
4 know, from my general knowledge of the company, but I
5 didn't design these packages. I'm not responsible for
6 the contracts of the broadcasters or what services are
7 offered.

8 Q Let me show you an exhibit that may help you.

9 MR. DeSANCTIS: If I may, Your Honor.

10 BY MR. DeSANCTIS:

11 Q Mr. Floater, you've been shown what has been
12 marked for identification purposes as SoundExchange
13 Trial Exhibit 16. This also is a page printed out
14 from the Live365.com website, correct?

15 A I am not familiar, but it has a Live365 link
16 on the bottom which seems to state that's where it
17 came from, uh-huh.

18 Q Why don't you take a look back at Exhibit 14,
19 with which I think you were more familiar.

20 A Uh-huh.

21 Q If you look in the second to last page --
22 this is where we were looking before --

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1 A Right.

2 Q -- and it was the royalty included listening
3 hour-based rates. And next to it is a -- the word
4 "explanation" in parentheses. Do you see that?

5 A In -- on the Exhibit 14?

6 Q Uh-huh. In the middle of the page --

7 A Oh, yes, uh-huh.

8 Q Do you see that, "explanation"?

9 A Uh-huh.

10 Q That's a hyperlink to something, right?

11 A Yes.

12 Q And on the final page, next to the heading
13 "standard" --

14 CHIEF JUDGE SLEDGE: I'm sorry. I didn't
15 understand that last question. You asked him if that
16 was a hyperlink. You made the statement that it is,
17 and you said yes. Was that intended to be a question
18 and an answer?

19 MR. DeSANCTIS: I'm sorry.

20 BY MR. DeSANCTIS:

21 Q Is the word "explanation," which is
22 underlined, a hyperlink to another page within the

1 Live365 site?

2 A I thought you told me that it was.

3 Q It is, isn't it?

4 A This is not a web page that I can click, so
5 I -- you know --

6 Q Fair enough. Let's look at the next page.
7 Next to the heading "standard listener-based rates" is
8 also the word "explanation" in parentheses, correct?

9 A Yes.

10 Q Okay. Now, let me turn your attention to
11 what's been marked as SoundExchange Trial Exhibit 16.

12 A Okay.

13 Q At the very top is the word "explanation,"
14 correct?

15 A Uh-huh.

16 Q And there's two explanations. There's
17 royalty included explanation and there's standard
18 packages explanation. Do you see that?

19 A Yes, I do.

20 Q Okay. And you -- and this -- this is a
21 printout of a page from the Live365.com website,
22 correct?

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1 A You were telling me that it is.

2 Q Well, do you have any reason to think that
3 this is not what it purports to be?

4 A No.

5 MR. DeSANCTIS: Your Honor, I would like to
6 move at this time for the admission into evidence of
7 SoundExchange Trial Exhibit 16 so that I can question
8 the witness on its specifics.

9 CHIEF JUDGE SLEDGE: Any objection to
10 Exhibit 16?

11 MR. OXENFORD: Your Honor, I don't believe
12 that this -- there is an objection. It's not been
13 authenticated. The witness doesn't know, beyond what
14 Mr. DeSanctis has told him, the origin of this
15 document.

16 CHIEF JUDGE SLEDGE: Any response?

17 MR. DeSANCTIS: Your Honor, this is the only
18 Live365 employee who is a witness in this case.
19 Live365 is the only commercial broadcaster in this
20 case. During his direct testimony, Mr. Floater
21 professed great facility with the Live365 website, not
22 only what's in his written testimony, which is the

1 exhibit that he prepared, which is a page from the
2 Live365 website, but also, when asked about where
3 advertising appears, he immediately said on the home
4 page, and this page, and that page. He's clearly very
5 familiar with the Live365 website.

6 He's the only witness that can authenticate
7 the website, and his testimony contains discussion of
8 the packages under which Live365 pays royalties for
9 its webcasters. He's the only one that puts in that
10 testimony, and I think his identification of the
11 documents to date should suffice under the
12 circumstances.

13 CHIEF JUDGE SLEDGE: Especially given the
14 hour, we'll review these before ruling. We'll recess
15 for one hour.

16 (Whereupon, at 12:11 p.m., a lunch recess was
17 taken.)

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1 AFTERNOON SESSION

2 (1:12 p.m.)

3 CHIEF JUDGE SLEDGE: Thank you. We'll come
4 to order.

5 On the offer of Exhibit 16, the exhibit has
6 not been authenticated. The objection is sustained.

7 BY MR. DeSANCTIS:

8 Q Mr. Floater, you are aware, are you not, that
9 in 2007 these copyright royalty judges issued an order
10 determining the rates that webcasters would pay
11 SoundExchange for webcasting?

12 A Yes, I am.

13 Q It's also true, isn't it, that shortly after
14 that decision came out, Live365 raised the rates that
15 it charges its webcasters for what you've called the
16 broadcast services, correct?

17 A I don't believe the rates were changed
18 shortly after. There was a long series of -- there
19 was a long period of time immediately after where
20 there were discussions going on with SoundExchange and
21 other parties on negotiations. There were other
22 hearings going on, and we knew the effect of raising

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1 rates on broadcasters. So it was my understanding
2 that the broadcast team waited a certain length of
3 time until maybe near the end of the year when they
4 actually changed some of the package pricing.

5 Q Okay. So -- fair enough. I said shortly
6 after --

7 A Right.

8 Q -- and that might not have been right. But
9 at some point after the CRJs issued their decision in
10 the last webcasting case, Live365 raised the rates
11 that it charges to its webcasters for its broadcasting
12 service, correct?

13 A I believe some of the packages had an
14 increase in rates. I'm not sure it was a standard
15 across-the-board raise. I'm not involved in setting
16 the broadcaster packages, as I explained.

17 Q And in fact, it wasn't just a coincidence of
18 timing, correct, that -- it was actually because the
19 webcasting rates went up that Live365 increased the
20 rates that it charged its webcasters for what you've
21 called the broadcast service, correct?

22 A There are a lot of costs involved in

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1 webcasting, from streaming and hosting. There is a
2 revenue side to the webcasting business, and there is
3 a cost side to the webcasting business. And I know
4 the company had asked me, over the period, what was my
5 expectations of the advertising revenue and the
6 subscription revenue that I could generate for
7 operating -- for distributing this content to
8 audiences.

9 And so they took my information on the
10 revenue expectations and they had to look at how they
11 were going to cover the cost of the webcasting, which
12 included the bandwidth and the technology, et cetera.
13 And if there was a raise in the rates of broadcasting,
14 it was because the company cannot operate in a
15 money-losing situation.

16 So we -- if the rates were raised, it was to
17 cover costs based on the revenue that my forecast
18 showed that we could deliver from advertising,
19 et cetera, from the webcasting of the performances.

20 Q I actually don't think there was an answer to
21 my question, but forgive me --

22 A You were asking me if I understood -- sorry

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1 to interrupt.

2 Q I asked a yes or no question, which was,
3 isn't it true that it was because the webcasting
4 statutory rates were increased by the last CRJs'
5 decision that Live365 raised the rates that it charges
6 its webcasters for what you've called the broadcast
7 services?

8 CHIEF JUDGE SLEDGE: You've answered that.
9 If you have any other part of your answer to give,
10 feel free to do it.

11 THE WITNESS: Yeah. I don't think it's a yes
12 or no question. You're saying, were the rates in the
13 packages specifically related to the cost of the
14 royalties? I'm saying it was specifically related to
15 the overall cost of webcasting.

16 CHIEF JUDGE SLEDGE: You don't need to repeat
17 what you've said.

18 BY MR. DeSANCTIS:

19 Q Do you recall when I took your deposition in
20 this case, Mr. Floater?

21 A Yes, I do.

22 Q I asked you if you knew that the rates that

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1 Live365 charged its webcasters had gone up following
2 the Webcasting II rates coming out of the CRJs'
3 decision. Do you recall that?

4 A Yes.

5 Q And you said you recalled that the rates went
6 up, and it was after the CRJs decided the Web II
7 statutory rates, correct?

8 A Yes, it was after, uh-huh.

9 Q Then I asked you why. I asked you, wasn't it
10 because -- I'm sorry. Let me withdraw that and
11 rephrase.

12 I then asked you, wasn't it because of the
13 Web II increased rates that Live365 raised its rates
14 to its broadcasters? And you said you didn't know.
15 Do you remember that? You said it was a management
16 decision?

17 A As I said here, that's not my decision.
18 That's not my group.

19 Q And when I asked you whether, by management,
20 you meant Mr. Mark Lam, you said, that's right. Do
21 you remember that?

22 A I would have said that Mark Lam probably was

1 involved in the decision. I would have probably
2 stated in my deposition that the -- we have a
3 broadcast team, and the broadcast manager, Jason
4 Stoddard, would have been the one that was involved in
5 determining the rates and made a recommendation to
6 Mr. Lam. I don't think Mr. Lam is that detailed with
7 broadcaster fees to make his own decisions.

8 Q Are you saying that you don't think Mr. Lam
9 was involved in the decision at all or that it wasn't
10 his decision alone?

11 MR. OXENFORD: Objection, Your Honor.
12 Mischaracterizing prior testimony.

13 MR. DeSANCTIS: I'm asking which one it was.

14 CHIEF JUDGE SLEDGE: He's already answered
15 the question, but if you -- if you want to see if
16 there's a difference in his answer, go ahead.

17 MR. DeSANCTIS: I'll withdraw the question,
18 Your Honor. I don't want to belabor that point.

19 BY MR. DeSANCTIS:

20 Q Would it surprise you, Mr. Floater, if, when
21 I asked Mr. Lam in his deposition the same question
22 that I just asked you, he had no trouble answering

1 that the rates that Live365 charges to its webcasters
2 were increased because of the increase in webcasting
3 rates due to the Web II decision?

4 A I don't know the thinking of Mr. Lam. I
5 would say that webcasting rates are the most
6 significant cost that we have in streaming of material
7 to the -- to the audiences. And so, in effect, an
8 increase in your most expensive cost would have had
9 a -- heavily impacted into the decision.

10 My earlier point was various packages were
11 changed for various reasons, and I am not aware, but
12 if the most expensive cost is webcasting rates, I'm
13 sure that had an effect on some of the package prices
14 that included that.

15 Q Okay. So is that a yes to my question?

16 A I'm saying that I don't know the -- how
17 Mr. Lam thought about the issue.

18 Q But you think there might be other reasons
19 other than the Web II rates that might have been part
20 of the reason why Live365 raised the rates that it
21 charges its webcasters?

22 MR. OXENFORD: Objection. Calls for

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1 speculation, Your Honor.

2 CHIEF JUDGE SLEDGE: Mr. DeSanctis?

3 MR. DeSANCTIS: I'm not asking him to
4 speculate. I'm actually trying to clarify his answer.

5 CHIEF JUDGE SLEDGE: He's already answered
6 that question. Sustained.

7 BY MR. DeSANCTIS:

8 Q Mr. Floater, you don't know, do you, whether
9 Live365's webcasters were ever told that the rates
10 that Live365 charged them as part of the broadcasting
11 services had gone up, at least in part due to the
12 increase in the statutory webcasting rates, do you?

13 A I'm not familiar with the communication that
14 went out to the webcasters regarding any package
15 pricing changes.

16 Q I'll show you your testimony, your written
17 direct testimony --

18 A Yes.

19 Q -- that you discussed earlier today.

20 A Uh-huh.

21 Q You describe several changes that you made --
22 several corrections that you made in the testimony,

1 correct? Do you remember that?

2 A Oh, the -- in the corrected testimony?

3 Q Yes.

4 A Yes, I do.

5 Q One you said was a change in a dollar figure
6 from --

7 A Nearly 1.5 to 1.3, yes.

8 Q Right. And the remainder were legal
9 conclusions. I think that's what you said; is that
10 right?

11 A Correct.

12 Q In fact, what you took out is all the
13 references where you said, in your initial testimony,
14 that Live365 took measures to make sure that its
15 webcasters were webcasting in a legal and statutorily
16 compliant way, right? That's what you took out?

17 MR. OXENFORD: Objection, Your Honor. It's
18 outside the scope of the direct examination. We
19 purposely took it out. We took it out because it
20 called for a legal conclusion on behalf of the client,
21 and the client is not an attorney -- the witness is
22 not an attorney. Therefore, it's going to be asking

1 information about legal conclusions that the witness
2 is not qualified to make.

3 CHIEF JUDGE SLEDGE: That's not the question
4 that was asked. Overruled.

5 BY MR. DeSANCTIS:

6 Q You can answer the question.

7 A Yes. I wouldn't be sitting in this courtroom
8 today if I, as an individual, did not feel that
9 Live365 and its services were being compliant with all
10 of the regulations of this court and the laws of the
11 webcasting. So it is my understanding, from the
12 notification of the copyright, that we were one of the
13 first companies to provide full census reporting of
14 all the performances to ensure the wide range of
15 artists were getting their reporting on.

16 We include performance complement checking.
17 We have software that monitors if the station is not
18 putting the name of the artist or -- et cetera. We do
19 not allow skipping of tracks to make sure that it's a
20 completely non-interactive service. And we follow the
21 other performance complement rules about the number of
22 songs from the same artist that can be played.

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1 So when I wrote I have -- my understanding is
2 that Live365 follows the regulations required to be a
3 compliant broadcaster.

4 CHIEF JUDGE SLEDGE: I didn't hear you ever
5 answer the question. You gave a nice speech, but what
6 was the answer to the question?

7 THE WITNESS: The answer is -- why did I take
8 out --

9 CHIEF JUDGE SLEDGE: No, sir. Did you redact
10 those portions as he described?

11 THE WITNESS: Yes, I redacted those portions,
12 excuse me.

13 CHIEF JUDGE SLEDGE: And now that we've had
14 that long speech, I'm not sure what it was that -- how
15 do you describe what you redacted?

16 THE WITNESS: He asked me if I took out the
17 words "legally compliant," and --

18 CHIEF JUDGE SLEDGE: That the webcasters were
19 legally compliant.

20 THE WITNESS: Legally compliant. And I said
21 that I put in my statement we were --

22 CHIEF JUDGE SLEDGE: Well, please don't

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1 repeat it.

2 THE WITNESS: -- compliant. Excuse me.

3 BY MR. DeSANCTIS:

4 Q But, Mr. Floater, you know, do you not, that
5 Live365 does not actually comply with all of the terms
6 of the statutory license?

7 MR. OXENFORD: Objection, Your Honor. We're
8 not here to determine whether Live365, as an
9 individual webcaster, has fully complied with any
10 particular regulation. There are other forums in
11 which those issues can be raised. We're here to set
12 rates for the industry. Mr. Floater has been offered
13 as a witness to discuss specific items which were
14 contained in his direct case exhibit. This is beyond
15 the scope of the exhibit and irrelevant to the issues
16 that we are deciding here today.

17 CHIEF JUDGE SLEDGE: Mr. Oxenford, that
18 objection may have had some persuasion until the last
19 speech by the witness. It's overruled.

20 MR. DeSANCTIS: Thank you, Your Honor.

21 BY MR. DeSANCTIS:

22 Q You can answer the question.

1 A The question -- if you could repeat it,
2 please.

3 Q Is that you are aware, are you not, that
4 Live365 does not currently comply with the terms of
5 the statutory license for webcasting?

6 A It is my understanding -- I am not able, as a
7 lawyer, to understand the term "legally compliant" and
8 draw that conclusion and, therefore, I redacted my
9 statement to include [sic] those legal conclusions
10 that I am not in a position to make.

11 Q Okay. Let's break it down for you, then, and
12 I'll try to leave the legal conclusions out of it.
13 Live365 is required to pay SoundExchange a particular
14 per performance royalty, correct?

15 A Correct.

16 Q That is required by law, correct?

17 A Correct.

18 Q And isn't it correct that Live365 does not
19 pay SoundExchange at that per performance royalty
20 required by law?

21 MR. OXENFORD: Objection, Your Honor. I
22 repeat the objection. This is outside the scope. Our

1 examination here today is not whether Live365 is
2 paying everything that it -- that's for another forum
3 to decide where not only can Mr. DeSanctis'
4 suggestions be put into evidence, but any defenses or
5 responses of the company could be placed into
6 evidence. That's not for this court to decide whether
7 a particular webcaster is legally compliant with all
8 its obligations under current SoundExchange rules.

9 CHIEF JUDGE SLEDGE: Mr. Oxenford, whether
10 one breaks the law or follows the law has a
11 substantial impact on the credibility of a witness.
12 The objection is overruled.

13 BY MR. DeSANCTIS:

14 Q Mr. Floater, can you answer the question?

15 A Live365 is paying -- is continuing to pay at
16 the 2005 royalty rates. My understanding -- I do not
17 see the checks that go out, but I understand from the
18 basic negotiations that the rates did not come out
19 until into 2007. So for 2006 we had to pay at those
20 rates.

21 I myself participated in a number of
22 negotiations with SoundExchange where I was told that,

1 during the negotiations, we could continue to pay at
2 those rates and a settlement would be done and, when a
3 settlement was done, a true-up would be reached. I
4 understand, from my accounting department, that any
5 balance in the payments that are not being transferred
6 to SoundExchange currently are being set aside for
7 payment under the true-up.

8 And so I -- I am hoping in negotiations and
9 discussions with SoundExchange to arrive at a
10 conclusion to set rates for small webcasters and, at
11 that time, similar to the other companies that I was
12 in those discussions with, such as Pandora, will make
13 the true-up payment at the time that is decided.

14 Q Your testimony here is, if I understood you
15 correctly, is that you personally were told by someone
16 at SoundExchange that Live365 did not have to pay at
17 the rates set by law in the Web II proceeding?

18 A Yes.

19 Q By whom?

20 A I would have to say that was Michael Huppe.

21 Q He didn't tell you, did he, that Live365
22 would never have to pay the Web II rates, did he?

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1 MR. OXENFORD: Objection. Your Honor, I
2 would just like to note a continuing objection to this
3 entire line. We've got the facts on the record now,
4 and now Mr. DeSanctis seems to be ready to go into
5 every aspect of every discussion concerning possible
6 settlement as well as issues of compliance. Again, I
7 think it's outside the scope of the direct testimony
8 and outside the issues before this court.

9 CHIEF JUDGE SLEDGE: Overruled.

10 BY MR. DeSANCTIS:

11 Q Withdraw the question. Mr. Floater, do you
12 remember when I asked you in your deposition about why
13 Live365 was not paying SoundExchange at the Web II
14 rates?

15 A If I would have said that, it was due to
16 negotiations ongoing with SoundExchange.

17 Q And do you recall that I asked you what was
18 the source of your understanding for that answer? Do
19 you recall that? Do you recall that? You don't
20 recall that?

21 A No.

22 Q Okay.

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1 MR. DeSANCTIS: Your Honor, if I may.

2 BY MR. DeSANCTIS:

3 Q Mr. Floater, do you see what is before you
4 that's been marked for identification purposes as
5 SoundExchange Trial Exhibit 17?

6 A Yes.

7 Q This is your deposition that was given in
8 this case, correct?

9 A Yes, that's correct.

10 Q Let me turn your attention to page 136 of the
11 deposition. And of course I'll remind you that
12 there's four pages on each of these pages that is part
13 of the exhibit. I'm referring to small page 136. And
14 I'd ask you to --

15 A Okay. Page 136, yes. Okay.

16 Q And on that page, I asked you what the source
17 of your understanding was for your answer regarding
18 these ongoing settlement negotiations. Do you see
19 that?

20 A Yes.

21 Q And you did not answer that you had been told
22 anything like what you just testified to by Mr. Huppe,

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1 correct?

2 CHIEF JUDGE SLEDGE: Where is the answer,
3 Mr. DeSanctis? I've gone down through two pages now
4 and I haven't seen it.

5 MR. DeSANCTIS: Just a moment, Your Honor.
6 That's exactly the point, Your Honor. There's --

7 CHIEF JUDGE SLEDGE: There's not an answer.
8 Is that your point?

9 MR. DeSANCTIS: The witness answered -- well,
10 if I may read it, the witness answered simply, after a
11 number of objections from counsel, that he's been
12 asked by management to prepare the previous proposals
13 per a request. There's nothing in that --

14 CHIEF JUDGE SLEDGE: What line are you
15 referring to, and what page?

16 MR. DeSANCTIS: I apologize, Your Honor. My
17 question to the witness is on line 19 of page 136.

18 CHIEF JUDGE SLEDGE: Right.

19 MR. DeSANCTIS: And scrolling down to
20 page 137, lines 10 through 12, the witness finally
21 gives a somewhat garbled answer that he was asked to
22 prepare it by management, and he nowhere said anything

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1 about having simply been told this by Mr. Huppe.

2 MR. OXENFORD: Objection, Your Honor. It's a
3 different question. The question he answered was that
4 he had been told by Mr. Huppe that he didn't have to
5 pay at the current rates until after settlement.
6 Here, the question is, how did he know that settlement
7 discussions were still ongoing?

8 Those are different questions.

9 CHIEF JUDGE SLEDGE: Overruled. It's not a
10 different question. It's the same question, and the
11 witness does not give the source of that
12 understanding. His answer is, "I've been asked by
13 management to refresh and prepare the previous
14 proposals per request."

15 I'm not sure how that answers it, but that's
16 the answer he gives.

17 BY MR. DeSANCTIS:

18 Q Mr. Floater, you're aware, are you not, that
19 on May 28th, 2008 SoundExchange sent a notice of
20 non-compliance to Live365?

21 A No, I am not.

22 MR. DeSANCTIS: If I may, Your Honor.

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1 BY MR. DeSANCTIS:

2 Q Mr. Floater --

3 A Yes.

4 Q -- what's been -- I've shown you what's been
5 marked for identification as SoundExchange Exhibit 18
6 dated May 28th, 2008. Have you ever seen this letter
7 before?

8 A No, I haven't.

9 Q Has this letter ever been discussed within
10 Live365 when you were present?

11 A No.

12 Q Who is Steve Chang?

13 A Steve Chang -- his title here is manager,
14 legal compliance. He is an office administrator at
15 the Foster City office.

16 Q What does it mean that he's manager of legal
17 compliance?

18 A The legal compliance activity, and Steve's
19 role is to monitor the software applications that we
20 have to ensure that stations in the performance
21 complement are being followed and that notices of
22 certification of filing of SoundExchange licenses,

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1 et cetera, are being handled.

2 Q Is Mr. Chang the Live365 employee who is
3 responsible for sending appropriate royalties to
4 SoundExchange?

5 A Steve is not in the accounting department.
6 So when you say sending the payment, I'm not sure what
7 you mean by sending the payment. He would not be
8 preparing the checks or mailing a check or --

9 Q Okay. I didn't mean it that literally, but
10 paying appropriate royalties is part of legal
11 compliance at Live365, isn't it?

12 A I would assume that would be in his job
13 description, or that would be his role, yes.

14 Q And so on at least May 28th, 2008,
15 SoundExchange informed Steve Chang that Live365 had
16 been failing to pay appropriate royalties, doesn't it?

17 MR. OXENFORD: Objection, Your Honor.
18 Assumes a fact not in --

19 CHIEF JUDGE SLEDGE: Sustained.

20 BY MR. DeSANCTIS:

21 Q Mr. Floater, would it surprise you if Mr. Lam
22 was familiar with this letter?

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1 MR. OXENFORD: Objection, Your Honor. Calls
2 for speculation.

3 CHIEF JUDGE SLEDGE: Overruled.

4 THE WITNESS: That would -- in speculation --
5 Mr. Lam did not discuss this letter with me. As the
6 CEO of the company, I would speculate that the legal
7 compliance manager brought it up to his attention.

8 BY MR. DeSANCTIS:

9 Q And would it surprise you to learn that,
10 after this letter was brought to Mr. Lam's attention,
11 Live365 continued not to pay royalties at the rates
12 established in Webcasting II?

13 MR. OXENFORD: Objection, Your Honor.
14 Irrelevant. Calls for speculation. And assumes facts
15 not in evidence.

16 CHIEF JUDGE SLEDGE: Mr. DeSanctis?

17 MR. DeSANCTIS: I don't think it actually
18 calls for speculation. I'm asking him if it was --
19 I'm asking if he would be surprised to learn that
20 fact, and he can say either yes or no.

21 CHIEF JUDGE SLEDGE: And you assume that it
22 was brought to Mr. Lam's attention. Objection

1 sustained.

2 BY MR. DeSANCTIS:

3 Q Mr. Floater, do you actually know whether
4 this letter was brought to Mr. Lam's attention?

5 A No, I don't.

6 Q Mr. Floater, you are aware, are you not, that
7 subsequent to May 28th, 2008 Live365 did not begin
8 paying SoundExchange at the rates required under the
9 Web II decision, correct?

10 MR. OXENFORD: Objection, Your Honor. Just
11 to note my continuing objection to this line of
12 questions.

13 CHIEF JUDGE SLEDGE: I don't know what a
14 continued objection is, Mr. Oxenford.

15 MR. OXENFORD: It's an objection to each of
16 these questions as being outside the issues before
17 this court, outside the scope of the direct
18 examination, cumulative at this point, and beginning
19 to get unduly repetitious.

20 CHIEF JUDGE SLEDGE: Overruled for a short
21 time.

22 THE WITNESS: Could you repeat your question.

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1 BY MR. DeSANCTIS:

2 Q You're aware, are you not, that after
3 May 28th, 2008, Live -- at no time did Live365 begin
4 paying SoundExchange at the rates required under the
5 Web II decision, correct?

6 A That is correct.

7 Q Nor did it pay the mandatory true-up for 2006
8 and 2007, correct?

9 A I don't know about the -- I don't create
10 checks to SoundExchange. I don't know the amount
11 paid. I know that the -- my understanding is the
12 company is working with SoundExchange to try to come
13 to a rate for small webcasters, and that the money
14 that is not being paid, whatever amount is the
15 difference between the amount that is due against the
16 full CRB rates and what the company has paid, has been
17 set aside for payment to SoundExchange.

18 MR. DeSANCTIS: If I may approach the
19 witness -- I'm sorry, the bench first.

20 BY MR. DeSANCTIS:

21 Q Mr. Floater, I've shown you what's been
22 marked for identification purposes SoundExchange

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1 Exhibit 19. Do you see that before you?

2 A Yes, I do.

3 Q This is a letter dated April 6, 2009 from
4 Kyle Funn of SoundExchange to Steve Chang, correct?

5 A Yes, it is.

6 Q Steve Chang is the manager of legal
7 compliance at Live365, correct?

8 A Correct.

9 Q Okay. And as far as you know, isn't it true
10 that following April 6th, 2009, there never came a
11 time at which Live365 began to pay SoundExchange at
12 the royalty rates set by the CRB in Web II?

13 MR. OXENFORD: Objection, one more time, Your
14 Honor, outside --

15 CHIEF JUDGE SLEDGE: Repetitious. Sustained.

16 BY MR. DeSANCTIS:

17 Q Mr. Floater, is it your position that
18 negotiations -- settlement negotiations with
19 SoundExchange are ongoing between Live365 and
20 SoundExchange even today.

21 A Yes, I do.

22 Q And that is the reason why you think Live365

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1 is justified in not paying the royalties required
2 under the Web II decision?

3 MR. OXENFORD: Objection, Your Honor. It's
4 beyond the scope of the direct examination. It's
5 calling for legal conclusions. It's also getting into
6 the settlement discussions that are being held between
7 the parties.

8 CHIEF JUDGE SLEDGE: Well, I'm going to
9 sustain the objection, but not for any of those
10 reasons. The witness has never said that Live365 is
11 justified in not paying the rates and following along.
12 The objection is sustained.

13 MR. DeSANCTIS: That's very fair.

14 BY MR. DeSANCTIS:

15 Q It's your position, is it not, that the
16 reason Live365 has not been paying SoundExchange at
17 the rates required by law is because ongoing --
18 because negotiations with SoundExchange are ongoing?

19 A Yes, that's my understanding.

20 MR. DeSANCTIS: If I may approach the bench,
21 Your Honor.

22 BY MR. DeSANCTIS:

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1 Q Mr. Floater, what I put before you is a
2 document marked for identification purposes as
3 SoundExchange Exhibit 20. It is dated August 20,
4 2009. It is a two-page letter from Colin Rushing to
5 N. Mark Lam. Do you see this?

6 A Yes, I do.

7 Q This is the third notice -- this is entitled,
8 Re: Third notice of compliance [sic], Live365's
9 webcasting service, correct?

10 A Correct.

11 Q Were you ever shown this letter, Mr. Floater?

12 A No, I was not.

13 Q Do you know if Mr. Lam ever received this
14 letter?

15 A No, I do not.

16 Q Let me turn your attention to page 2 of the
17 exhibit. It's double-sided -- or some copies are
18 double-sided. Okay. Yours is not, I apologize.

19 A Okay.

20 Q At the very top, the first full sentence
21 says, "We have never acceded to Live365's decision to
22 flout rates and terms."

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1 Do you see that?

2 MR. OXENFORD: Objection, Your Honor.

3 Irrelevant. Immaterial. Hearsay. Outside the scope
4 of direct evidence. Cumulative and repetitive.

5 CHIEF JUDGE SLEDGE: Mr. DeSanctis?

6 MR. DeSANCTIS: Your Honor, this is a
7 document that was sent to Mr. Lam, that Mr. Lam
8 testified in his deposition about having received and
9 read this document and his reaction to it and whether
10 it was to come into compliance with the law or not.

11 Mr. Floater has testified as to why Live365
12 has not been paying the rates required by law. One of
13 the reasons he gave was that Mr. Huppe told him
14 something. That statement did not appear in
15 Mr. Floater's deposition.

16 Then he says there were ongoing negotiations,
17 and this document is critical to proving that the
18 witness' statement is simply wrong. And it would have
19 come in through Mr. Lam. And for the counsel to
20 object to its admission into evidence when it is a
21 letter addressed to Mr. Lam is remarkable when the
22 witness is testifying in ways that is patently

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1 impeached by this document.

2 CHIEF JUDGE SLEDGE: Objection sustained.

3 BY MR. DeSANCTIS:

4 Q Mr. Floater, are you aware that SoundExchange
5 informed Mr. Lam that negotiations were over?

6 A Not only am I not aware, it would come as a
7 complete surprise to me.

8 Q You should have before you what's been marked
9 as SoundExchange Exhibit 13.

10 A Okay.

11 Q This is the deposition of Mark Lam. I would
12 direct your attention and ask you to read to yourself
13 the very bottom, the last question asked by
14 Mr. DeSanctis on page 100. This is deposition
15 page 100, meaning small page 100.

16 A Did you request I read page 100?

17 MR. OXENFORD: To yourself.

18 BY MR. DeSANCTIS:

19 Q To yourself. The very last question that I
20 asked -- that Mr. DeSanctis asks, and I'd also like
21 you to read pages 101 and 102.

22 You testified a minute ago that you would be

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1 shocked to learn that SoundExchange ever informed
2 Live365 that negotiations were over. Do you remember
3 that?

4 A Yes.

5 Q But you now know that Mr. Lam received the
6 letter dated August 20, 2009 marked for identification
7 as Exhibit 20, correct?

8 MR. OXENFORD: Objection, Your Honor. I'm
9 not sure how -- it calls for a fact not in evidence,
10 that Mr. Floater knows what Mr. Lam was told.

11 CHIEF JUDGE SLEDGE: Mr. DeSanctis.

12 MR. DeSANCTIS: Your Honor, at this time,
13 then, I would renew my motion to move Exhibit 13 into
14 evidence.

15 CHIEF JUDGE SLEDGE: Motion is denied.
16 Objection sustained.

17 BY MR. DeSANCTIS:

18 Q Mr. Floater, when you prepared your written
19 testimony and described what you refer to there as the
20 benefits of aggregation, you discussed some of the
21 benefits that, in your opinion -- the alleged benefits
22 that, in your opinion, Live365 confers on

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1 SoundExchange, correct?

2 A Yes.

3 Q Did it enter into your analysis, in writing
4 that testimony, that Sound -- that Live365 was not
5 paying -- has never paid SoundExchange at the rates
6 required by the Web II decision?

7 A The payment is another question that is in
8 discussion with SoundExchange. The benefit I was
9 referring to to SoundExchange was, instead of having
10 7,000 Excel spreadsheets come in of performances that
11 they have to track and figure out, that we took care
12 of all of that reporting and management and compliance
13 and provided that as a single report to SoundExchange.

14 So I was referring to those things. And we
15 collected the money from the webcasters and
16 advertising and made a single payment to SoundExchange
17 for royalties. And I felt these were extreme benefits
18 to a company like SoundExchange, instead of having to
19 deal with 7,000 individual webcasters to try to
20 collect and report.

21 So the variance was subject to another
22 discussion. The benefit to SoundExchange remains the

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1 same from my statement.

2 CHIEF JUDGE SLEDGE: Do you need him to state
3 the question against, since you didn't answer it?

4 THE WITNESS: Excuse me. Yes, that would be
5 helpful.

6 BY MR. DeSANCTIS:

7 Q The question, Mr. Floater, was whether you
8 considered the fact that Live365 has never been paying
9 SoundExchange at the rates required in the Web II
10 decision when you prepared your testimony concerning
11 the alleged benefits that Live365 confers on
12 SoundExchange?

13 A No, that -- that was not considered.

14 Q You just testified in your answer, did you
15 not, Mr. Floater, that one of the things, in your
16 opinion -- one of the benefits, in your opinion, that
17 Live365 does confer on SoundExchange is one
18 consolidated report to royalty payment?

19 A Yes.

20 MR. DeSANCTIS: If I may approach, Your
21 Honor.

22 BY MR. DeSANCTIS:

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1 Q Mr. Floater, this is one of the reports
2 called a statement of account, one of those
3 consolidated reports that Sound -- that Live365 sends
4 to SoundExchange, correct?

5 A That's -- again, I've never seen this, but
6 this seems to be one of the reports where all of the
7 aggregated performances are provided, yes.

8 Q Is that Steve Chang's signature on page 2?

9 A I never saw Steve's signature, or I never
10 asked him to sign any document, but it would be my
11 assumption that that's Steve's signature because his
12 name is underneath it.

13 MR. DeSANCTIS: Your Honor, at this time, I
14 would like to move for the admission of SoundExchange
15 Exhibit 21.

16 CHIEF JUDGE SLEDGE: Any objection to
17 Exhibit 21.

18 MR. OXENFORD: Yes, Your Honor. This
19 document has not been authenticated. It's irrelevant
20 and immaterial to the willing buyer/willing seller
21 determination. It's outside the scope of the direct
22 testimony. And I see no reason that it should be

1 admitted.

2 CHIEF JUDGE SLEDGE: The document has not
3 been authenticated. The objection is sustained.

4 BY MR. DeSANCTIS:

5 Q Mr. Floater, if I could direct your attention
6 to line 14 and 15 in the chart contained on Exhibit 21
7 that's in front of you.

8 A The statement of account?

9 Q Uh-huh. Do you have it in front of you?

10 A Yes, I do.

11 Q The exhibit contains a per play rate on those
12 lines, correct?

13 A Yes.

14 Q And that was not the rate that was in effect
15 in 2009, correct?

16 MR. OXENFORD: Objection, Your Honor.
17 Repetitive. Cumulative. Outside the scope of the
18 direct examination. Irrelevant and immaterial. We've
19 been through this over and over. The witness has
20 already said what Live365 -- what rate they're paying
21 at and why they're paying at it. We've been going at
22 it for about an hour now on exactly that same

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1 question. I don't know how many different times we
2 need to get it into the record.

3 CHIEF JUDGE SLEDGE: Sustained.

4 BY MR. DeSANCTIS:

5 Q Mr. Floater, when you were preparing your
6 direct testimony in this case and you were writing
7 about the benefits that Live365 confers on
8 SoundExchange as an aggregator, did you consider the
9 fact that Live365 sends falsified reports to
10 SoundExchange?

11 MR. OXENFORD: Objection, Your Honor.
12 Argumentative and asked and answered, as well as
13 irrelevant, immaterial, repetitious and cumulative.

14 CHIEF JUDGE SLEDGE: Where does it establish
15 that the reports submitted by Live365 are falsified?

16 MR. DeSANCTIS: I'm simply asking the witness
17 if he considered that in preparing his written direct
18 testimony.

19 CHIEF JUDGE SLEDGE: That being a fact, then
20 the objection is sustained.

21 BY MR. DeSANCTIS:

22 Q Mr. Floater, let me ask you one or two more

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1 questions about what's been identified as
2 SoundExchange Exhibit 21. You don't know who -- I'm
3 sorry. Let me back up.

4 We were looking a minute ago at the per play
5 rate that's contained in lines 14 and 15. Do you see
6 that?

7 A Yes.

8 Q Specifically, the per play rate contained in
9 line 15, you don't know who included that rate on this
10 document, do you?

11 A No.

12 Q Okay. You don't know if it was SoundExchange
13 or someone at Live365?

14 A I answered that I did not know who put
15 these -- who prepared this or if this is a form off
16 the website of SoundExchange or something that was
17 created here. I had not seen this form.

18 MR. DeSANCTIS: If I may, Your Honor.

19 BY MR. DeSANCTIS:

20 Q I'm showing you, Mr. Floater, what has --
21 sorry.

22 I've shown you, Mr. Floater, what has been

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1 identified as SoundExchange Exhibit 22. Do you
2 recognize this as a statement of account that is
3 available -- that was available on SoundExchange's
4 website in 2009?

5 A No, I don't.

6 Q Mr. Floater, you have an MBA, correct?

7 A I do.

8 Q And you have occasion from time to time to
9 review Live365 financial documents, correct?

10 A Some of the financial documents of the
11 company, yes.

12 Q Do you recall at your deposition I showed you
13 a document called an eight-year financial historical
14 trend and comparison?

15 A Yes.

16 Q You're also familiar, are you not, with a
17 similar document, Live365 five-year financial
18 historical trend and comparison?

19 A I remember some documents with some columns
20 of numbers and things. So if you want to show me the
21 ones you think -- you're referring to, I'll be happy
22 to see if they're the documents that I had seen at the

1 deposition.

2 Q Sure.

3 MR. DeSANCTIS: If I may, Your Honor.

4 BY MR. DeSANCTIS:

5 Q Mr. Floater, I've shown you what's been
6 premarked as SoundExchange Exhibit 24, correct?

7 A Yes.

8 Q Do you recall discussing this document with
9 me at your deposition?

10 A Yes.

11 Q And do you recall that, at your deposition,
12 you said that you had seen it prior to the deposition,
13 correct?

14 A Yes.

15 Q This document was created by Live365; is that
16 correct, Mr. Floater?

17 A Yes, I believe this was created by the
18 Live365 accounting department.

19 Q And you're referring, when you say that --
20 I'm sorry my question wasn't clear -- to what's been
21 marked as SoundExchange Exhibit 24, correct?

22 A Yes.

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1 MR. DeSANCTIS: Your Honor, I'd like to move
2 for admission of SoundExchange Exhibit 24 into
3 evidence.

4 CHIEF JUDGE SLEDGE: Any objection to
5 Exhibit 24?

6 MR. OXENFORD: No objection, Your Honor. But
7 we would ask that the protective order apply. These
8 are internal financial documents produced to
9 SoundExchange under the protective order, and they
10 were marked as restricted documents during the course
11 of the deposition and during the course of discovery.

12 CHIEF JUDGE SLEDGE: Without objection, it's
13 admitted.

14 (SoundExchange Trial Exhibit Number 24 was
15 received into evidence.)

16 CHIEF JUDGE SLEDGE: Response to the motion
17 to apply?

18 MR. DeSANCTIS: I have no objection to the
19 motion, Your Honor.

20 CHIEF JUDGE SLEDGE: The motion is granted.

21 BY MR. DeSANCTIS:

22 Q Mr. Floater -- I'm sorry.

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1 MR. DeSANCTIS: Your Honor, if I may
2 approach.

3 BY MR. DeSANCTIS:

4 Q Mr. Floater, I'm showing you what's been
5 marked as SoundExchange Trial Exhibit 23 for
6 identification. Do you recognize this as a Live365
7 five-year financial historical trend and comparison?

8 A Yes.

9 Q In fact, this has the same information as
10 Exhibit 24, but for years '04 through the first nine
11 months of fiscal year 2009 as opposed to from '02
12 through the first nine months of fiscal '09, correct?

13 A Correct.

14 MR. DeSANCTIS: Your Honors, I would like to
15 move for the admission of SoundExchange Trial
16 Exhibit 23 into evidence.

17 CHIEF JUDGE SLEDGE: Any objection to
18 Exhibit 23?

19 MR. OXENFORD: No objection, Your Honor.

20 CHIEF JUDGE SLEDGE: Without objection, it's
21 admitted.

22 (SoundExchange Trial Exhibit Number 23 was

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1 received into evidence.)

2 MR. OXENFORD: Your Honor, we would ask that
3 the protective order be applied to this document for
4 the same reasons as the prior document. This is
5 internal more detailed corporate financial information
6 Live365 has not routinely made to the public,
7 competitors or anything of the sort.

8 CHIEF JUDGE SLEDGE: Any objection?

9 MR. DeSANCTIS: No, Your Honor.

10 CHIEF JUDGE SLEDGE: Without objection, the
11 motion is granted.

12 JUDGE WISNIEWSKI: Mr. DeSanctis, if these
13 contain exactly the same data as the other prior
14 exhibit, why do we need both?

15 MR. DeSANCTIS: Honestly, it's only because
16 the second one that was introduced is much easier to
17 read.

18 JUDGE WISNIEWSKI: That's a matter of
19 opinion. Okay. Thank you.

20 MR. DeSANCTIS: Fair enough.

21 BY MR. DeSANCTIS:

22 Q Mr. Floater, I'd like to direct your

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1 attention to SoundExchange Trial Exhibit 23. Okay?

2 A Okay.

3 Q Now, recall earlier that we -- earlier today
4 we were discussing the fact that Live365 provides what
5 you called broadcast services to the Live365
6 webcasters, correct?

7 A Yes.

8 Q And Live365 gets paid for those services by
9 the webcasters, correct?

10 A Yes.

11 Q That revenue that Live365 gets paid by its
12 webcasters for what you've called the broadcast
13 services is contained in Trial Exhibit --
14 SoundExchange Trial Exhibit 23 under the heading
15 "Broadcast services" under "Revenue," correct?

16 A Yes, it is.

17 Q Okay. That revenue is not included in the
18 category below entitled, "Internet radio network,"
19 correct?

20 A Correct.

21 Q Under the heading "Internet radio network" --
22 do you see that heading?

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1 A Yes.

2 Q -- Live365 revenues are divided into
3 subscription and advertising, correct?

4 A Subscription, advertising and other.

5 Q And other. Thank you.

6 So subscription, that's revenue that Live365
7 receives from its customers that have subscription to
8 the ad-free webcasting service, correct?

9 A It is the subscription of audience members
10 listening to the Internet radio that pay for the -- a
11 subscription service. Yes -- I'm just wanting to make
12 sure, when you say customers of Live365, these are
13 audience members that pay to support their stations
14 and hear the station without advertising.

15 Q How about if we call them listeners --

16 A Listeners.

17 Q -- as opposed to your webcasters? Okay.

18 A Yes.

19 Q And under "Advertising" is the revenues that
20 Live365 collects not from subscription, but from
21 advertisers for ads placed on the free Live365
22 service, correct?

1 A That is the number of the price of the orders
2 prior to any network fees we were talking about
3 earlier. That is the gross ad order that the
4 advertising agency secured.

5 Q That's your advertising revenue, correct?

6 A Yes.

7 Q Now, if you go down past revenues, the first
8 item is, "Direct cost of sales," and under that is the
9 heading "DSRP." DSRP stand for digital sound
10 recording performance, correct?

11 A Yes.

12 Q So here this document records the royalties
13 that Live365 owes to SoundExchange, correct?

14 A This -- the DSRP does -- records the
15 liability for the sound recording performances for the
16 streaming of the performances to the audience, yes.

17 Q And it records that liability at the Web II
18 rates established by the CRJs, correct?

19 A Yes, it does.

20 Q So that does not record what Live365 pays to
21 SoundExchange in royalties, correct?

22 A That is correct. That is the amount that

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1 Live365, in combination, have paid to SoundExchange
2 and set aside following true-up activity following
3 settlement.

4 Q And if I could draw your attention, then,
5 down past "Total cost and expenses" to the line
6 EBITDA. Do you see that?

7 A Yes, I do.

8 Q So the EBITDA on this document is calculated
9 under the assumption that Live365 is accruing at the
10 per performance royalty rates established by the CRB
11 in Web II, correct?

12 A Correct.

13 Q That EBITDA line is not calculated based on
14 what Live365 has actually been paying to
15 SoundExchange?

16 A Correct.

17 Q And that EBITDA number has been positive in
18 all of the last four years, right, fiscal '06, '07,
19 '08 and '09?

20 A The number here is positive through
21 June 2009. If you looked at our current financial
22 statement, in the last months --

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1 CHIEF JUDGE SLEDGE: Are you answering the
2 question?

3 THE WITNESS: -- it has been negative.

4 The -- it's not the last four years. It's
5 through June '09.

6 CHIEF JUDGE SLEDGE: The question was the
7 last four years? I believe you're right. I had
8 interrupted you inappropriately. Did you finish your
9 answer?

10 THE WITNESS: Yes. Thank you, Your Honor.

11 BY MR. DeSANCTIS:

12 Q Mr. Floater, in addition to the financial
13 statements that we have been looking at that are
14 Exhibits 23 and 24, Live365 maintains balance sheets,
15 correct?

16 A I would imagine they maintain balance sheets,
17 yes.

18 MR. DeSANCTIS: May I approach, Your Honor?

19 BY MR. DeSANCTIS:

20 Q I put in front of you, Mr. Floater, what has
21 been marked as SoundExchange Trial Exhibit 25 for
22 identification purposes. Do you see that?

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1 A I do.

2 Q This document was produced from Live365,
3 correct?

4 A This is the first time I've seen a balance
5 sheet for the company, so I assume it is. I
6 appreciate getting a copy.

7 Q Do you recognize this as a Live365.com
8 balance sheet?

9 A I've never seen a Live365 balance sheet. I
10 am -- first of all, I am not in the corporate
11 headquarters. I'm in another thing. I don't deal
12 with the investors. And so I have been left out of
13 the discussions of investment and cash and banking.

14 MR. DeSANCTIS: Your Honor, I'm going to go
15 ahead and move for the admission of SoundExchange
16 Trial Exhibit 25 into evidence.

17 CHIEF JUDGE SLEDGE: Any objection to
18 Exhibit 25?

19 MR. OXENFORD: Yes, Your Honor, we would
20 object. This has not been authenticated by the
21 witness.

22 MR. DeSANCTIS: Might I respond?

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1 CHIEF JUDGE SLEDGE: Yes.

2 MR. DeSANCTIS: Your Honor, at this point --
3 Mr. Oxenford stood up at this podium in his opening
4 statement and he said, I quote, we have opened our
5 books to the court. We have not redacted our
6 financial statements. We provided operating
7 statements for the company to show what really
8 webcaster costs and revenues are in the marketplace.

9 And he goes on to explain to the court that
10 that is the centerpiece of Live365's case, Live365's
11 arguments in this case, that they have opened their
12 financial books and have not held anything back.

13 JUDGE ROBERTS: Apparently, he's changed his
14 mind, Mr. DeSanctis.

15 MR. DeSANCTIS: Well, he's changed his mind,
16 obviously, about whether to put on Mr. Lam, but
17 Mr. Floater is still up here talking about declining
18 ad revenues, talking about declining subscription
19 revenues, which I would argue, based on the documents
20 that have already been submitted into evidence, is not
21 true. And their expert relies on the -- their expert,
22 who we're going to hear from tomorrow, relies on

1 Live365's financial information and their financial
2 data.

3 The fact that Live365's whole case is still
4 based on their financial data, when now -- or their
5 financial condition -- put it that way -- their
6 financial condition, I really think it pushes the
7 envelope for Mr. Oxenford to be objecting to Live's
8 financial documents at this time, particularly when
9 this is the only witness we're ever going to have from
10 Live365.

11 I would note that this court's rules provide
12 that documents can be offered into evidence without a
13 supporting witness for good cause shown. That is
14 37 CFR 351.10(a). I think, based on the way this case
15 has played out and the way Live365 still is putting in
16 their case through Mr. Floater and through -- we'll
17 hear from Mr. Fratrik tomorrow, I would submit that
18 good cause has been shown for this document to come in
19 even without a supporting witness.

20 JUDGE ROBERTS: You said that there's no
21 witness to put this information in unless it is
22 Mr. Floater, but at the same time you acknowledge that

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1 Dr. Fratrik's model -- one of his models does attempt
2 to incorporate the financial information of Live365.
3 So which is it?

4 MR. DeSANCTIS: And I apologize if I spoke
5 loosely. Dr. Fratrik's theories are based on two
6 things. Number one, they're based on the financial
7 condition of Live365 in the marketplace as an
8 aggregator --

9 JUDGE ROBERTS: Right, so he's going to make
10 those assertions.

11 MR. DeSANCTIS: -- and as a webcaster.

12 That's right. And his testimony is
13 explicitly based on certain financial documents. Now,
14 I don't know if Mr. Fratrik has ever seen this balance
15 sheet, but this is a balance sheet that was produced
16 by Live365. It has the Live365's Bates number on it.
17 And this is going to be our only fact witness who is
18 an employee of Live365 who would be able to discuss
19 it.

20 CHIEF JUDGE SLEDGE: Well, help me
21 understand. If, as you say, Live365 does not prove
22 what they represented they would prove -- as you said,

1 Mr. Oxenford represented they would prove things, and
2 if they do not prove it and if their expert's
3 testimony is based on evidence that is not presented
4 and not accepted into evidence, then why would
5 SoundExchange complain about that? It would seem to
6 establish the best case possible for SoundExchange
7 that Live365 has not presented anything credible.

8 MR. DeSANCTIS: If that's the way it plays
9 out, Your Honor, obviously I would agree that that is
10 a good scenario for SoundExchange.

11 CHIEF JUDGE SLEDGE: I'm curious about why
12 you're complaining about them doing that.

13 MR. DeSANCTIS: Sure. One of my concerns is
14 that an expert sometimes is allowed to rely on
15 documents and information that are not in evidence
16 that he has reviewed.

17 CHIEF JUDGE SLEDGE: Well, that might be
18 different than the facts here.

19 MR. DeSANCTIS: My understanding was that
20 that --

21 CHIEF JUDGE SLEDGE: Certainly that can be
22 true in the abstract, but this is a very specific

1 issue here.

2 MR. DeSANCTIS: Well, that's right, but if
3 Mr. Fratrik is permitted to testify based on -- about
4 Live365's financial condition based on documents and
5 information that are not in evidence, then certainly
6 we would have put this evidence -- this evidence would
7 have come in through Mr. Lam. He's not here, but
8 Mr. Fratrik is still here. If Live365 is saying
9 they're also going to withdraw Mr. Fratrik's testimony
10 or are willing to strike any analysis that was based
11 on financial information that's not in the record, I
12 think that would be a different story. But to be --

13 CHIEF JUDGE SLEDGE: Or if they don't have a
14 choice, if his testimony the stricken because there's
15 no such evidence in -- admitted.

16 MR. DeSANCTIS: That's right. Then the
17 answer to Your Honor's question is yes, that would be
18 a good situation for SoundExchange. But, of course,
19 that's tomorrow, and I don't know what the answer is.
20 And so I'm trying to be a careful lawyer and make sure
21 that we can get the evidence we need in, not knowing
22 how that evidentiary ruling is going to go.

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1 CHIEF JUDGE SLEDGE: The objection on
2 authenticity is sustained.

3 JUDGE ROBERTS: As the pile of presented
4 exhibits grows at the end of the table, I would remind
5 counsel that you need to remove all the items that are
6 in here before the conclusion of tomorrow.

7 MR. DeSANCTIS: We sure will, Your Honor.
8 Thank you.

9 If I may approach the bench, Your Honor.

10 BY MR. DeSANCTIS:

11 Q Mr. Fratrik [sic], I put before you what has
12 been marked for identification purposes as
13 SoundExchange Exhibits 26 and 27. Do you see those?

14 CHIEF JUDGE SLEDGE: No, sir. 27 and 28.
15 That's what you presented here.

16 MR. DeSANCTIS: I think that might have been
17 poor handwriting on my part or on my colleague's part.

18 CHIEF JUDGE SLEDGE: All right. In looking
19 at the clock, we'll recess ten minutes.

20 MR. DeSANCTIS: Thank you, Your Honor.

21 (Whereupon, a short recess was taken.)

22 CHIEF JUDGE SLEDGE: Thank you. We'll come

1 to order.

2 MR. DeSANCTIS: Your Honor, I have another
3 copy of Exhibit 26 that's written a little more
4 clearly.

5 CHIEF JUDGE SLEDGE: As opposed to what is
6 written 28? All right.

7 BY MR. DeSANCTIS:

8 Q Mr. Floater, before you are what has been
9 marked SoundExchange Exhibits 26 and 27 for
10 identification purposes. Do you see those?

11 A I do.

12 Q You don't know who prepared these documents,
13 do you?

14 A No, I don't know specifically who prepared
15 these documents.

16 Q Okay. And you don't know how they were
17 prepared, do you?

18 A No.

19 Q And you don't know when they were prepared,
20 do you?

21 A No.

22 Q Thank you. You can put those to the side.

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1 Mr. Floater, Live365 has monthly -- what are
2 called company meetings, correct?

3 A Yes.

4 Q You typically attend those meetings either in
5 person or by phone?

6 A The -- I am in an office in Los Angeles. The
7 company's headquarters is in Foster City. I make one
8 out of three of the company meetings and, if I'm not
9 on an advertising proposal or something, I will join
10 by phone. So I typically make them. I don't make
11 them all.

12 Q I see. When you said one out of three, you
13 attend one out of three in person?

14 A Yes.

15 Q I see. And you typically attend the others
16 by phone?

17 A Yes.

18 Q And at these company meetings, the financial
19 performance of the company over the last month is
20 typically one of the things that is discussed,
21 correct?

22 A Yes.

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1 MR. DeSANCTIS: If I may approach, Your
2 Honor.

3 BY MR. DeSANCTIS:

4 Q Mr. Floater, I've put before you what's been
5 marked as SoundExchange Trial Exhibit 28. Do you see
6 that?

7 A Yes, I do.

8 Q This is a PowerPoint presentation from the
9 Live365 company meeting, November 7, 2008, correct?

10 A Correct.

11 MR. DeSANCTIS: At this time, Your Honors,
12 I'd like to move for the admission of SoundExchange
13 Exhibit 28.

14 CHIEF JUDGE SLEDGE: Any objection to
15 Exhibit 28?

16 MR. OXENFORD: No, Your Honor.

17 CHIEF JUDGE SLEDGE: Without objection, it's
18 admitted.

19 (SoundExchange Trial Exhibit Number 28 was
20 received into evidence.)

21 BY MR. DeSANCTIS:

22 Q I'd like to turn your attention, Mr. Floater,

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1 to the third page of the exhibit bearing the Bates
2 number Live 12872. Do you see that?

3 A Uh-huh.

4 Q I'm reading this correctly, am I not, that in
5 October 2008, Live365 beat its revenue forecast; is
6 that correct?

7 A Yes.

8 Q In fact, the actual revenues for October '08
9 were 107 percent of the forecast, correct?

10 A Yes.

11 Q And the ad revenue in particular exceeded the
12 forecast, correct?

13 A Yes.

14 Q Let me turn your attention to the next page.
15 The line beginning with the first upward pointed arrow
16 states, "33 months in a row that we have been
17 profitable," with a smiley face. Do you see that?

18 A Yes, I do.

19 Q And do I -- I read the note, the asterisked
20 note at the bottom of this slide to mean that that
21 calculation is true, that Live365 has been profitable
22 for 33 months in a row, assuming accrual of the

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1 per performance sound recording royalties set by the
2 CRJs, by the copyright royalty judges, in
3 Webcasting II, correct?

4 A The profitability of the company, one of the
5 items is the sound recording royalties, yes.

6 Q Okay. And that --

7 A It also considers no marketing expense and
8 reduced staffing and other things which allowed the
9 company to be -- have more -- have positive return.

10 Q Okay. And when the company makes those
11 calculations in order to calculate its profitability,
12 it assumes an accrual of the sound recording
13 performance royalty at the rates set in Web II,
14 correct?

15 A Yes.

16 Q Turning your attention to the next page of
17 the exhibit, this page indicates that in the seven
18 years of fiscal year 2002 through fiscal year 2008,
19 revenue increased every year, correct?

20 A Correct.

21 Q You can put that document to the side for the
22 moment.

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1 MR. DeSANCTIS: If I may approach, Your
2 Honors.

3 BY MR. DeSANCTIS:

4 Q I've just put in front of you, Mr. Floater,
5 what has been marked for identification purposes as
6 SoundExchange Trial Exhibit 29. Do you see that?

7 A I do.

8 Q This is the SoundExchange -- the slide
9 presentation, the PowerPoint slide presentation, from
10 the Live365 company meeting September 11, 2009,
11 correct?

12 A Correct.

13 MR. DeSANCTIS: At this time, Your Honor, I
14 would like to move for the admission of Exhibit --
15 SoundExchange Exhibit 29 into evidence. And I would
16 note that there are two different types of redactions
17 in this document. The first -- some of the redactions
18 where you see the word "redacted" on -- beginning on
19 page with the Bates number 13011, those redactions
20 were performed by Live365, and that's how this
21 document was produced to SoundExchange.

22 On the last two pages, there are some black

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1 bars. Those redactions were performed by
2 SoundExchange because the redacted material contained
3 terms that were -- that are to be excluded from this
4 proceeding under the Webcaster Settlement Act.

5 CHIEF JUDGE SLEDGE: No black bars on the
6 last two pages of the exhibit.

7 MR. DeSANCTIS: I apologize. It's not the
8 last two pages. I misspoke. It's pages 13013 and
9 13014.

10 JUDGE ROBERTS: What was the reason, again,
11 Mr. DeSanctis?

12 MR. DeSANCTIS: These portions that
13 SoundExchange has redacted contain certain rates,
14 terms and information from non-precedential deals that
15 fall under the Webcaster Settlement Act.

16 SoundExchange has moved that SoundExchange
17 Trial Exhibit 29 be admitted into evidence.

18 CHIEF JUDGE SLEDGE: Any objection to
19 Exhibit 29?

20 MR. OXENFORD: Your Honor, my only objection
21 is the last redaction on page Live 13014. Looking at
22 our copy of that document, it doesn't seem to refer at

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1 all to a -- the rates, terms or any specifics of
2 the -- any non-precedential deal. I'm not sure why
3 that one paragraph would be redacted in this document.

4 And, in fact, the redaction on the previous
5 page, again, doesn't -- the page 013013, again,
6 doesn't refer to the rates, the terms, the prices paid
7 by any settlement deals. It may refer to the
8 existence of settlement deals, but it doesn't say
9 anything about rates or terms or anything else.

10 CHIEF JUDGE SLEDGE: So you're raising that
11 about all the redactions except for the first one by
12 SoundExchange?

13 MR. OXENFORD: Right. The first two
14 redactions were redacted by Live365 when the document
15 was produced based on attorney/client privilege.
16 Those are slides dealing with attorney's advice to the
17 company. The black redactions, the final on pages 13
18 and 14, were ones that SoundExchange has just added
19 since this document was produced in discovery, and we
20 feel that it doesn't provide the entire information in
21 that document -- it doesn't contain any information
22 that's privileged.

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1 CHIEF JUDGE SLEDGE: Apparently, you didn't
2 hear my question. Your objection then goes to the
3 last two redactions done by SoundExchange?

4 MR. OXENFORD: Correct, Your Honor.

5 CHIEF JUDGE SLEDGE: And not the first
6 redaction done by SoundExchange?

7 MR. OXENFORD: I believe there are only two
8 pages with redactions by SoundExchange.

9 CHIEF JUDGE SLEDGE: And on those two pages,
10 there are three redactions.

11 MR. OXENFORD: We don't see that any of those
12 three redactions are proper.

13 CHIEF JUDGE SLEDGE: Okay. All right. Any
14 response?

15 MR. DeSANCTIS: I simply disagree, Your
16 Honor. As I stand here, I struggle with how to
17 convince Your Honors of the fact -- of the truth that
18 our disagreement seems to be over. I'm looking at
19 the -- one of the redactions right now, the last of
20 the redactions, and I am very clearly seeing terms and
21 characterizations of terms of a WSA deal that is
22 non-precedential, and I am seeing, in the first page

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1 of redactions again characterizations of terms in
2 certain non-precedential deals by Live365.

3 CHIEF JUDGE SLEDGE: The offer is your
4 burden. The objection is sustained.

5 MR. DeSANCTIS: If I may approach the bench,
6 Your Honor.

7 CHIEF JUDGE SLEDGE: Yes, sir.

8 BY MR. DeSANCTIS:

9 Q Mr. Floater, I have put before you what has
10 been marked for identification purposes as
11 SoundExchange Exhibit 30. Do you see that?

12 A I do.

13 Q This is the PowerPoint presentation slides
14 from the Live365 company meeting dated December 11,
15 2009, correct?

16 A Correct.

17 MR. DeSANCTIS: Your Honor, I would like to
18 move for the admission of SoundExchange Trial
19 Exhibit 30 into evidence, and I would add that all
20 redactions in this document were performed by Live365
21 and that this is the way the document was produced to
22 SoundExchange.

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1 CHIEF JUDGE SLEDGE: Any objection to
2 Exhibit 30?

3 MR. OXENFORD: No objection, Your Honor.

4 CHIEF JUDGE SLEDGE: Without objection, it's
5 admitted.

6 (SoundExchange Trial Exhibit Number 30 was
7 received into evidence.)

8 BY MR. DeSANCTIS:

9 Q Mr. Fratrik, Exhibit 30 is dated December 11,
10 2009, correct?

11 A My name is Johnie Floater.

12 Q I apologize, Mr. Floater.

13 A Just for the record.

14 Q I'm glad you're on your toes.

15 Mr. Floater, this document is dated
16 December 11, 2009, correct?

17 A Correct.

18 Q Let me direct your attention to page bearing
19 the Bates number Live 13020.

20 A Yes.

21 Q In the first bullet point -- I'm sorry, the
22 first line with a downward facing arrow says, "The

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1 first month experienced loss after we had been
2 profitable for 43 months." Do you see that?

3 A I do.

4 Q And those calculations, the first month of
5 loss after 43 months of profitability, are calculated
6 assuming accrual of the royalty rates at the rate set
7 in Webcasting II, correct?

8 A Correct.

9 Q And if I could turn your attention to the
10 prior page, 13109.

11 JUDGE ROBERTS: Before we leave that,
12 Mr. Floater, since we see the asterisks here saying
13 under the new CRB rate 2009, are these actual numbers,
14 then, of total revenue and total costs or are they
15 just estimates?

16 THE WITNESS: I would say these are not
17 audited statements. The team, the accounting team,
18 has to complete as close as possible within a week
19 after the end of every month for financial data, and
20 these are information the accountant team provides to
21 the company -- the company meeting. I would have to
22 say they are estimates, but they are extremely close

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1 estimates.

2 JUDGE ROBERTS: How do you know that they're
3 extremely close estimates?

4 THE WITNESS: Well, the changes that I see
5 that come afterwards, the advertising revenue
6 sometimes changes afterwards because the reports don't
7 come in immediately. So they give us an estimate.
8 The agencies give us an estimate of what they did for
9 the story. So that revenue might change.

10 The performance reports are accurate, so we
11 know what the performances are at the rate that we put
12 in here. Some of the company employees' expenses
13 might not have all come in yet, so that may not be in
14 these numbers.

15 JUDGE ROBERTS: So it sounds like, since
16 these numbers are estimates, they are not actuals?

17 THE WITNESS: Yes.

18 CHIEF JUDGE SLEDGE: I'm puzzled by your last
19 answer to Mr. DeSanctis' question. You said that the
20 first month experienced loss after we had been
21 profitable for 43 months was under the CRB year 2009
22 rate, and that explained why there was a loss?

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1 THE WITNESS: No. My understanding of the
2 question, Your Honor, was, did we use the .0018 in the
3 calculation of royalties to include in the cost
4 expense here? And the rate -- the royalty cost was
5 calculated at the .0018.

6 CHIEF JUDGE SLEDGE: Now, going back to
7 Exhibit 28, which was October '08 -- I want to make
8 sure I heard you right. You said all of those
9 calculations were based on Web II rates?

10 THE WITNESS: The rate that was in effect at
11 the time of the reporting of that month, yes.

12 CHIEF JUDGE SLEDGE: Okay. So the rates that
13 were applicable to Exhibit 28 and Exhibit 30 are the
14 same set of rates? It may have changed because the
15 year changed, but it's the same rates.

16 THE WITNESS: Yes.

17 CHIEF JUDGE SLEDGE: Okay. All right. Thank
18 you.

19 THE WITNESS: The company does understand its
20 liability under the CRB rates.

21 CHIEF JUDGE SLEDGE: I didn't ask you that.

22 THE WITNESS: Excuse me, Your Honor.

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1 CHIEF JUDGE SLEDGE: That's stricken as
2 that's -- that was a voluntary, self-serving
3 statement.

4 THE WITNESS: Okay.

5 BY MR. DeSANCTIS:

6 Q Mr. Floater, by December 11, 2009, the
7 books -- the monthly books at Live365 for October '09
8 had closed, correct?

9 A The -- at the company meeting?

10 Q Uh-huh.

11 A I'm not sure what you mean by closed. The
12 estimates were in. The accounting team had finished.
13 Whether they turned it over to -- you know, finalized
14 or for tax purposes or that, I'm not sure.

15 Q Okay. Based on that level of information,
16 I'd like to turn your attention to page 13019 of
17 Exhibit 30. And I'm reading this correct, am I not,
18 that in October '09, Live365's, let's call it the
19 estimate for their actuals, beat the forecast for both
20 VIP subscription revenue and ad revenue; isn't that
21 correct?

22 A Yes.

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1 Q Live365's fiscal year closes September 30?

2 A That's my understanding.

3 Q Okay. So when we were looking at some
4 exhibits earlier, namely Exhibit 23, you noted that
5 fiscal '09 had not closed yet at the time that
6 document was created. Instead, it shows only the
7 first nine months of fiscal '09, correct?

8 A Yes.

9 Q Okay. So -- but by December 11, 2009, the
10 books, at least for estimating purposes, had closed
11 with respect to fiscal year '09, correct?

12 A That would be my understanding.

13 Q Okay. So let me turn your attention to Live
14 13023, which is one of the pages contained in
15 Exhibit 30. This shows, does it not, that for fiscal
16 year 2009, although Live365 had predicted negative net
17 profit and loss -- in other words, loss -- Live365
18 actually experienced in fiscal year '09 net profit,
19 correct?

20 A Yes.

21 Q And does this net P&L, these numbers -- minus
22 190 was the fiscal 2009 forecast, positive 1,067 was

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1 the fiscal year 2009 actual -- does that actually mean
2 \$1,067 or does that mean -- are there some zeros left
3 off of there?

4 A That would be in thousands.

5 Q So what is that number actually?

6 A 1,000,067.

7 Q Okay. And does that number correspond to the
8 EBITDA number that we were looking at earlier on
9 Exhibit 23 for fiscal year 2009?

10 A On Exhibit 23, that included only nine
11 months?

12 Q Yes.

13 A Are you asking me is it the same line item or
14 is it the same --

15 Q Is it the same line item in the sense that is
16 what we're seeing in Exhibit 30 called "net P&L" the
17 same thing as the EBITDA line in Exhibit 23? Now, of
18 course, line 23 is only for the first nine months of
19 fiscal '09, right?

20 A Yes.

21 MR. OXENFORD: Objection, Your Honor.

22 Mr. Floater is not the accountant for Live365. I'm

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1 not sure it's established that he knows what those
2 numbers are.

3 CHIEF JUDGE SLEDGE: Overruled.

4 THE WITNESS: Yeah. One document is prepared
5 by Melodie Hu for financial statements, the
6 Exhibit 23, which would be an official accounting
7 statement. The other is for a company meeting. But
8 it seems that it does include both of the sales
9 revenue line -- and the expenses seem to be similar.
10 I believe that they are the same -- same revenue, same
11 expense comparison.

12 BY MR. DeSANCTIS:

13 Q Only for different time periods?

14 A Only for different time periods. That's my
15 assumption.

16 Q Okay. Let me turn your attention to
17 page 13025 in Exhibit 30. Did you attend that
18 Christmas party?

19 A I sure did. It was my idea.

20 Q It was your idea. Was that open -- that was
21 a harbor cruise for --

22 MR. OXENFORD: Objection, Your Honor,

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1 relevance.

2 BY MR. DeSANCTIS:

3 Q I was just going to ask you if you know how
4 much that cost.

5 CHIEF JUDGE SLEDGE: Sustained.

6 MR. DeSANCTIS: Okay. Fair enough.

7 BY MR. DeSANCTIS:

8 Q Mr. Floater, you recall, do you not, in your
9 written direct testimony stating that VIP membership
10 consists of less than 2 percent of Live365 site
11 visitors?

12 A Yes, I do.

13 Q And I think you testified in your direct
14 testimony that VIP -- which is your subscription
15 service, correct?

16 A Uh-huh.

17 Q -- accounts for only 25 percent of Live365's
18 ATH, correct?

19 A I said that it -- that it attributed -- it
20 was -- accounted for about 25 percent. I don't know
21 if I said only 25 percent, because it seems quite
22 impressive.

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1 Q Okay. 25 percent, you say, of ATH is
2 attributable to the subscription service, then, and
3 the other 75 percent is attributable to the ad-based
4 service?

5 A Yes.

6 Q But it's true, is it not, that in 2005, 2006,
7 2007 and 2008 revenues from your -- from Live365's
8 subscription service were actually higher than
9 revenues from its ad service, correct?

10 A Oh, yes.

11 Q And that was true in fiscal year 2009 as
12 well?

13 A Through June 2009?

14 Q I was asking for fiscal 2009 if you knew --

15 A Oh, for fiscal 2009? I would imagine, yes.

16 Q In paragraph 13 of your testimony, you
17 testify -- you stated that Live365's Internet radio
18 subscription revenues are contracting. Do you see
19 that? Do you recall that testimony?

20 A I recall the testimony.

21 Q Isn't it true that subscription revenues at
22 Live365 actually increased year over year in each of

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1 fiscal years '05, '06, '07 and '08?

2 A Yes.

3 Q Were you looking at Exhibit 23 to -- when you
4 answered that question? The document in your hand is
5 Exhibit 23.

6 A Yes.

7 Q You later testified, Mr. Floater, regarding
8 the fact that Live365 earns only 50 cents to 65 cents
9 on the dollar for every ad hour sold. Do you recall
10 that testimony?

11 A Yes, I do.

12 Q And that's because of the commission, so to
13 speak, that the ad network charges Live365, correct?

14 A The ad networks, their business, takes, yes,
15 takes a --

16 Q They take the other cut?

17 A There's two deductions from the advertising.
18 The final client until the money comes to us -- a
19 client, like Esurance or Coca-Cola, uses an ad agency
20 that comes up with the creative and buys. And the
21 standard practice in the ad agency world is to take
22 15 percent for their service of doing the buying of

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1 the advertising. And then the ad networks that secure
2 that purchase are taking now 40 to 50 percent of the
3 money before it's paid to Live365.

4 Q And that's just how these ad networks work,
5 right? These aren't special rules that were made up
6 to apply solely to Live365, correct?

7 A Yes, that's the advertising business.

8 Q Okay. And without these ad networks,
9 Live365 -- it wouldn't be possible for Live365 to
10 continue its ad-supported service, correct?

11 A The revenue for its ad-supported service
12 would be much less if there was not the ad networks
13 that were selling multiple players at the time.
14 Whether that would mean that the entire ad-supported
15 business or any streaming would be gone completely, I
16 can't make that assumption, but definitely we would
17 see a lot less revenue if they didn't exist.

18 Q Let's go back to something that we talked
19 about a little earlier on, Mr. Floater, which is
20 the --

21 JUDGE WISNIEWSKI: Actually, before you do
22 that, could I just clarify something on the

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1 ad-supported services?

2 THE WITNESS: Sure.

3 JUDGE WISNIEWSKI: With respect to the
4 individual stations, would you confirm something that
5 I thought I understood from your earlier testimony.
6 Do they get some share of that ad revenue?

7 THE WITNESS: You'd have to look at it like
8 this. I don't write these stations a check, but if
9 the cost of broadcasting for a webcaster is a hundred
10 dollars, I charge them less by -- because I make up
11 some of the money from the advertising revenue.

12 JUDGE WISNIEWSKI: You're giving them some
13 credit.

14 THE WITNESS: So I reduce their fee. So
15 that's why you'll see in the personal packages they're
16 much less, because I make up the cost of the
17 broadcasting with that ad revenue.

18 JUDGE WISNIEWSKI: Thank you, sir.

19 BY MR. DeSANCTIS:

20 Q Mr. Floater, do you recall your written
21 testimony in which you stated that Live365's
22 click-to-buy feature has generated \$1.3 million in

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1 retail sales for the music industry over the past
2 several years?

3 A Yes, I do.

4 Q You're aware, are you not, that that's only a
5 little over half of the amount that Live365 owes to
6 SoundExchange for past royalties but has not been
7 paying, correct?

8 MR. OXENFORD: Objection, Your Honor.
9 Relevance, calls for a conclusion and immaterial to
10 the questions that we have before us as to the willing
11 buyer/willing seller determination.

12 CHIEF JUDGE SLEDGE: Overruled.

13 THE WITNESS: First of all, the \$1.3 million
14 that I'm referring to is not revenue to Live365. The
15 \$1.3 million is a report that I received from iTunes
16 and Amazon of \$1.3 million of CD purchases or download
17 purchases from their site. That \$1.3 million in those
18 sales generated, over that same time period, \$56,000
19 for Live365 as a commission, a lead finding fee to
20 introduce Amazon to the buyer of that particular
21 music.

22 The question about this amount of money, and

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1 that is the difference between what the liability is
2 and the CRB rate, is -- there is a larger number as
3 you see in the financial statements that I just saw in
4 the balance sheet about the amount owed. So there is
5 a difference there, yes.

6 BY MR. DeSANCTIS:

7 Q I'm sorry. So the amount that is -- that
8 Live365 owes to SoundExchange that you just saw in the
9 balance sheet is larger than 1.3 million, correct?

10 CHIEF JUDGE SLEDGE: That's not what he said.

11 MR. DeSANCTIS: I apologize.

12 BY MR. DeSANCTIS:

13 Q Isn't it true, Mr. Floater, that the amount
14 that Live365 owes SoundExchange -- and here I'm
15 talking about the differential between the Web II
16 rates and what Live365 has actually been paying
17 SoundExchange -- isn't it true that that number is
18 larger than \$1.3 million?

19 CHIEF JUDGE SLEDGE: Mr. DeSanctis, he just
20 told you that the 1.3 million is an amount paid to a
21 third party; it has nothing to do with Live365.

22 MR. DeSANCTIS: Well, no, I understand that,

1 Your Honor. In fact, that's very much the point that
2 I think makes this very relevant, which is, in his
3 testimony, Mr. Floater touts this \$1.3 million in
4 revenue that goes to the record companies as a benefit
5 that they've received because of this click-to-buy
6 feature on the Live365 website. He says, because of
7 that feature, that feature has generated \$1.3 million
8 for the record companies and the artists. And I'm
9 trying to contextualize that figure to make the point
10 that that figure is actually far smaller than what
11 they have been withholding from the record companies
12 and the artists.

13 BY MR. DeSANCTIS:

14 Q It's true, is it not, Mr. Floater, that the
15 difference between what Live365 owes SoundExchange and
16 what it's actually been paying SoundExchange is larger
17 than 1.3 million?

18 MR. OXENFORD: Again, we would object as
19 being irrelevant.

20 CHIEF JUDGE SLEDGE: Overruled.

21 THE WITNESS: The only -- the -- according to
22 the CRB rates, the difference is greater than the

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1 \$1.3 million, yes.

2 BY MR. DeSANCTIS:

3 Q And do you know the size of the difference?

4 A No.

5 Q In paragraph 31 of your written direct
6 testimony, you refer to a broadcaster music library.
7 Do you recall that testimony?

8 A Yes.

9 JUDGE ROBERTS: What page is that on,
10 Mr. DeSanctis?

11 MR. DeSANCTIS: I'm sorry. That's on
12 page 12, paragraph 31.

13 BY MR. DeSANCTIS:

14 Q And that is a library in which record labels
15 and artists have deposited their sound recordings and
16 indicated that Live365 -- and they were waiving their
17 royalties if Live365 would play those sound recordings
18 on the website, correct?

19 A The -- of all of the tracks in the Live365
20 webcaster library, music library, some of the tracks
21 have been waived under the agreements we looked at
22 earlier. Not all of the music in the library has

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1 waived the rights.

2 Q I see. So of the 116,132 tracks that are in
3 the library, it's only some subset of those for which
4 royalty rights have been waived?

5 A Yes.

6 Q Okay. And the total number of music tracks
7 in Live365's webcasters individual libraries is over
8 4.5 million, correct? Isn't that right?

9 A Yes.

10 Q Your written testimony includes a number of
11 exhibits of agreements between Live365 and record
12 labels for inclusion of sound recordings in the
13 broadcast music library, correct?

14 A Correct.

15 Q And each of those is dated 2004 or 2005,
16 correct?

17 A Correct.

18 Q There's none in your -- Live365 actually
19 hasn't entered into any additional such agreements
20 since 2004 or, I should say, since 2005, with more
21 record labels for the inclusion of music tracks into
22 the broadcast music library, correct?

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1 A No new agreements.

2 Q And are the agreements that are attached to
3 your written direct testimony all such agreements that
4 exist? I mean, we discussed that there's no new ones,
5 but there aren't additional old ones, are there?

6 A Not that I know of.

7 Q Okay. Mr. Floater, it's true, is it not,
8 that Live365 competes in its business with
9 simulcasters, correct?

10 A Could you define what you mean by
11 simulcasters? Are you talking about terrestrial radio
12 stations that put their signals up on the Internet for
13 streaming?

14 Q Yes.

15 A Some of the Live365 webcasters are
16 simulcasters. We have over a hundred radio stations
17 that use the Live365 service for the webcasting of
18 their broadcasts.

19 Q But the majority of simulcasters in this
20 country are not Live365 webcasters, correct?

21 A Not yet.

22 Q And Live365 competes with those services,

1 doesn't it?

2 A Live365 competes with any provider of music.

3 Q So any -- when you say any provider of music,
4 that means -- so Live365 then competes not only with
5 simulcasts, but with broadcast terrestrial radio,
6 correct?

7 A The audience has a variety of ways to listen
8 to music, and Live365 Internet radio is one segment of
9 that, and our direct competitors would be more people
10 who choose various Internet radio services. But you
11 have so much time in a day, and wherever you listen to
12 music is another choice.

13 Q Okay. So your primary competitor, I think
14 you said, would be other Internet music services, but
15 you also compete, don't you, against all other music
16 sources, like terrestrial radio?

17 A Yes.

18 Q Okay. And when you said other Internet music
19 sources are your primary competition, that would be
20 both non-interactive statutory webcasting like Live365
21 or more interactive options or fully on-demand
22 Internet music options, correct?

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1 A The -- on the listening side of the company.

2 Q So you compete with those services for
3 listeners?

4 A Right.

5 Q Do you compete with other ad-supported
6 services for ad dollars?

7 A An advertiser that's trying to reach a user
8 uses a variety of medias, from print to television to
9 radio, terrestrial to Internet. There's so much of
10 that pie, and we compete for portions of that pie.

11 Q And so you compete with -- for ad dollars
12 with other ad-supported services both in the Internet
13 radio space and on terrestrial over-the-air radio?

14 A Yes.

15 Q The same way you compete for listeners in
16 those two realms, correct?

17 A Yes.

18 Q Isn't it true, Mr. Floater, also that your
19 free-to-the-user ad-supported service actually is
20 intended to, in part, drive sales to your subscription
21 service? Is that right?

22 A We do -- our main source of subscription

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1 sales is converting people who have become familiar
2 with the station and want to support it. So if the
3 user has not heard a station yet or has not fallen in
4 love somewhere or found a particular thing, it would
5 be very hard to convert them.

6 So the advertising-supported service for free
7 listening is the easiest way to get somebody to start
8 using the service so that you have a chance to convert
9 them.

10 Q When you say convert --

11 A Convert them to become a paying subscriber.

12 Q So your ad-supported service is the best
13 source of conversions to your subscription service,
14 correct?

15 A (Nods head affirmatively.)

16 Q Is that correct? We need an audible response
17 for the record.

18 A Yes.

19 Q Okay. But it's also true, isn't it, at the
20 same time, that if Live365 cancelled its ad-supported
21 service altogether, that actually might end up
22 generating more subscription revenue than ad revenue?

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1 Isn't that correct?

2 A I don't believe that. So if we had thought
3 that, we would be doing that immediately.

4 Q Many of the Live365 webcasters are hobbyists,
5 correct?

6 A Yes. This is not their primary line of
7 business.

8 Q In fact, some of them aren't in it for the
9 money at all, correct?

10 A The majority are not.

11 Q I want to go back to something that we talked
12 about much earlier today.

13 A Can I make a correction?

14 Q Yes.

15 A When I say they're not in it for the money, I
16 mean they are not trying to personally profit from
17 their operation of their radio station. They are
18 trying to cover -- get their costs covered or, you
19 know, not have -- you know, to help generate revenues
20 for their business, but they are not in the
21 business -- they are not broadcasting to find an
22 additional source of revenue for themselves.

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1 Q Okay.

2 CHIEF JUDGE SLEDGE: I was struggling with
3 your answer on that for another reason. Whether
4 someone is in a business for the money would also
5 apply to the costs they're incurring in that
6 business -- that would be money in the business,
7 wouldn't it?

8 THE WITNESS: Yes.

9 CHIEF JUDGE SLEDGE: So whether they're
10 meeting their costs, including the royalties that they
11 owe, would be part of being in the business for their
12 money -- for money?

13 THE WITNESS: Your Honor, that's what I was
14 trying to explain, that there is an objective to
15 generate some revenue. It's not trying to generate a
16 job or a personal revenue from these stations. That's
17 my definition of a hobbyist.

18 CHIEF JUDGE SLEDGE: Well, would you say that
19 all hobbyists are trying to meet their costs?

20 THE WITNESS: There is a -- they have a
21 limited amount of hobbyist fees that they could do, so
22 they have -- they're trying to either keep their costs

1 within their capability or find ways to be able to
2 have their service offered to more without having to
3 pay more.

4 CHIEF JUDGE SLEDGE: Are you assuming that
5 they are paying their costs?

6 THE WITNESS: The costs of the webcasting is
7 covered somehow, but through the combination of all
8 the types of businesses we try to do, yes.

9 CHIEF JUDGE SLEDGE: Your statement is not
10 factually correct. Are you assuming that the
11 hobbyists that use Live365 are paying their costs?
12 You said that the costs are being paid, and that's not
13 factually correct.

14 THE WITNESS: Yes. The -- they're paying a
15 fee. Is it the entire cost of the broadcasting? No.

16 CHIEF JUDGE SLEDGE: Okay. Thank you.

17 THE WITNESS: Sorry for the confusion.

18 JUDGE WISNIEWSKI: Mr. Floater, Let me come
19 back to something that I asked you about before, and
20 this had to do with the ad-supported services. You
21 had indicated that, rather than directly share
22 revenues from such ad-supported services, that the

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1 stations would simply receive some credit depending
2 on, I take it, their -- the amount of transmissions
3 they can do or some other measure. Do you remember
4 that testimony?

5 THE WITNESS: Yes, I do.

6 JUDGE WISNIEWSKI: Could you explain to me
7 how revenues that are ad-supported, which are
8 commercial revenues, can't be construed as a share of
9 any profit that's actually made from this enterprise?
10 I mean, I don't care where you post it in the account.

11 THE WITNESS: Right. The excess revenue over
12 the entire cost is used to keep the operation going.
13 The question is --

14 JUDGE WISNIEWSKI: Well, let's suppose, for
15 the sake of argument, that the revenues from the
16 ad-supported services for all of these individual
17 stations actually exceeded all other costs that were
18 incurred by them, and you gave them the credit on the
19 accounting basis that you have and that credit, in
20 fact, would require you provide them a rebate. Aren't
21 they commercial enterprises?

22 THE WITNESS: Yes. And I think Live365 has

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1 filed for them as a commercial webcaster.

2 JUDGE WISNIEWSKI: Live365 is transmitting
3 as --

4 THE WITNESS: Commercial webcaster, yes.

5 JUDGE WISNIEWSKI: And that's true whether
6 these stations are hobbyists, isn't it?

7 THE WITNESS: (Nods head affirmatively.)

8 JUDGE WISNIEWSKI: Is that a yes?

9 THE WITNESS: Yes. Yes. Excuse me.

10 JUDGE WISNIEWSKI: And that's true whether
11 these stations, as you indicate in your testimony on
12 page 11, are schools, isn't it?

13 THE WITNESS: Yes.

14 JUDGE WISNIEWSKI: And that's true whether
15 these stations are faith-based organizations, as
16 indicated in your testimony at page 11, isn't it?

17 THE WITNESS: Yes.

18 JUDGE WISNIEWSKI: So they're all commercial
19 webcasters, at least in small letters. Okay. Thank
20 you. I just want to make sure that we're talking
21 about the commercial rate here that everyone seems to
22 be focusing on.

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1 CHIEF JUDGE SLEDGE: Go ahead.

2 BY MR. DeSANCTIS:

3 Q Just to be clear, Live365 is a for-profit
4 company, correct, Mr. Floater?

5 A Yes.

6 Q We discussed very early in the day,
7 Mr. Floater, that some of the Live -- most of the
8 Live365 webcasters opt for Live365 to pay the sound
9 recording royalties for them, but not all do, correct?

10 A Correct.

11 Q If a webcaster decides to pay its own
12 royalties and not have Live365 pay for them, that
13 webcaster's channels can still appear on the Live365
14 channel index on the website, correct?

15 A They can, yes.

16 Q And they do, right?

17 A No, not all do.

18 Q Well, I'm not asking if all do. But there
19 are channels -- and I'm not asking about people --
20 about services that don't use your broadcast services.
21 I'm asking about webcasters that use your broadcast
22 service, but for whatever reason may not ask Live365

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1 to pay the royalties for them. If those channels want
2 to be listed on the Live365 channel index, they can,
3 correct?

4 A Yes.

5 Q And there are some channels listed on the
6 Live365 channel index that pay their own royalties,
7 correct?

8 A Correct.

9 Q Let me show you -- why don't you take a look
10 at page 5, paragraph 10 of your written testimony.

11 A Paragraph what?

12 Q Paragraph 10.

13 A 10, on page 5. Okay.

14 Q That paragraph reads, "Currently, advertising
15 accounts for approximately 39 percent of Live365's
16 Internet radio revenues."

17 Do you see that?

18 A Yes, I do.

19 Q And by "currently," did you mean September of
20 2009?

21 A Yes. When I wrote this --

22 Q When you wrote the initial -- when you wrote

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1 your initial statement, right?

2 A Yes.

3 Q That does not -- and I'm just checking if I'm
4 right. That does not mean that currently, meaning
5 yesterday or today, in 2010, it's approximately 35 --
6 39 percent of Live's Internet radio revenues, correct?
7 This was part of your initial testimony.

8 A That was part of my initial testimony. This
9 was -- "currently" was used at the time I wrote this
10 and submitted it to the court, at that September
11 period.

12 Q Okay. And at that time, advertising
13 accounted for approximately 22 percent of Live365's
14 total revenues, correct?

15 A I would have to look at the --

16 Q Why don't you look at what's been marked as
17 SoundExchange Trial Exhibit 23, which is in front of
18 you, and I think you'll be able to glean it from that.

19 A So you would do the calculation of 1.4 -- for
20 the period October to June, you'd do the calculation
21 of 1.4 over 7.1. Was that what you're asking?

22 Q I'll just withdraw the question. It's okay.

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1 I don't have to get into that.

2 MR. DeSANCTIS: With that, Your Honor, I have
3 no further questions.

4 CHIEF JUDGE SLEDGE: Any redirect?

5 MR. OXENFORD: May I have just one moment,
6 Your Honor, to confer with my colleagues?

7 CHIEF JUDGE SLEDGE: Yes, sir.

8 (Discussion held off the record.)

9 MR. OXENFORD: Okay.

10 REDIRECT EXAMINATION

11 BY MR. OXENFORD:

12 Q Good afternoon again, Mr. Floater, just a few
13 questions. Mr. DeSanctis referred you to the
14 agreements that were attached to your direct case
15 exhibits behind tabs 3, 4, 5 and 6. Why have there
16 been no new agreements since 2005?

17 A The main reason is I have nobody on the team
18 that -- at that period in time we had someone in music
19 label relations that could make calls to these
20 organizations, handle the incoming request and arrange
21 to do those type of deals.

22 Since the -- since the company had to watch

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1 out for its survival, the benefit of the reduced
2 royalties from being able to have royalty waived music
3 outweighed the cost of obtaining them. So we lost the
4 staff and it was not replaced right around the time in
5 2005.

6 As -- I see this kind of activity as
7 basically advertising for artists. It's an
8 advertising model. As running the advertising team, I
9 take it on and, you know, I continue to get calls from
10 artists -- and I get 20, 30 CDs a week from artists
11 asking to be included in the library. I have artists
12 that buy advertising on Live365, but I am not -- I am
13 not pursuing that business model at this time because
14 of the complication with securing rights and making
15 sure you have the rights and they have the rights to
16 give you. It's just too complicated. So we don't
17 have anybody working on it.

18 JUDGE ROBERTS: The costs exceeded the
19 benefits?

20 THE WITNESS: Yes.

21 JUDGE ROBERTS: I believe you said it the
22 other way around.

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1 THE WITNESS: Excuse me.

2 BY MR. DeSANCTIS:

3 Q Mr. Floater, I'd refer you to SoundExchange
4 Trial Exhibit Number 30, the notes of company meeting
5 from December 11, 2009.

6 A Yes, sir.

7 Q In particular, I refer you to Bates number
8 page Live 013023, the financial forecasts.

9 A Yes.

10 Q On the top of the page, there are some notes
11 concerning the financial forecasts. Could you take a
12 moment to review those notes?

13 A Yes.

14 Q And if you know, can you explain what was
15 meant by those notes on that page?

16 A Well, in order to keep the operation of the
17 company going, keeping the cash flow, we did not
18 replace departing staff. I cut back any marketing
19 expense that I would have liked to have done. We did
20 not give raises to employees. In fact, our employees
21 are underpaid in the marketplace.

22 So there was a lot -- the reason that we were

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1 able to pull out a positive number was significant
2 cutbacks within the organization to continue to go.

3 Q Now, Mr. Floater, the term "EBITDA" has been
4 referred to by Mr. DeSanctis, E-B-I-T-D-A. Do you
5 know what that means?

6 A The earnings before interest, taxes
7 depreciation and amortization.

8 Q What expenses remain to be paid by a company
9 out of those earnings, if you know?

10 A Well, you have your investor capital, which
11 is your most significant thing. We've looked at a few
12 years where Live365 was profitable, a few months where
13 it was profitable. To get to that point, there was a
14 significant amount of investment beforehand, and those
15 costs of both the technology and the equipment that
16 operates the company are not considered in a
17 month-to-month statement.

18 Q I refer you to page 013020 of that statement,
19 financial review, October of '09 versus September of
20 '09 --

21 A Yes.

22 Q -- where there's a reference to first month

1 experienced loss after profitable for 43 months.

2 Can you tell the court what has happened with
3 profitability since this meeting on December 11, 2009?

4 MR. DeSANCTIS: Objection. That is beyond
5 the scope of direct examination -- beyond the scope of
6 cross-examination, I'm sorry.

7 MR. OXENFORD: I think at one point
8 Mr. DeSanctis asked the question where have profits
9 been during the last four years, and this is certainly
10 part of the last four years.

11 CHIEF JUDGE SLEDGE: Objection sustained.
12 It's also outside his expertise. Or knowledge, I
13 should say.

14 BY MR. DeSANCTIS:

15 Q Mr. Floater, do you know where the profits
16 have been since this meeting?

17 A I have attended --

18 CHIEF JUDGE SLEDGE: Just a minute. Is there
19 an objection?

20 MR. DeSANCTIS: I guess I would object on the
21 ground that, number one, it is beyond my
22 cross-examination, where I believe my questioning was

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1 limited to the four years that were in the exhibit --
2 Exhibit 23, the fourth of which was only the first
3 nine months of 200 -- fiscal 2009. And we then
4 discussed the close of fiscal 2009. I don't recall
5 discussing any fiscal 2010 numbers.

6 I would also point out that at one point it
7 was Mr. Oxenford who objected to my questioning
8 because the witness isn't an accountant, and he now
9 seems to be asking questions that go to those issues.

10 CHIEF JUDGE SLEDGE: Objection sustained.

11 BY MR. OXENFORD:

12 Q Mr. Floater, you've been shown an exhibit
13 from SoundExchange that shows the pricing for the
14 individual webcasters that they pay to Live365 in
15 order to webcast. Do you recall those prices?

16 A I recall the web page that they were
17 referring to.

18 Q Do you know whether the costs paid by the
19 individual webcasters covers the royalty expenses
20 incurred by Live365 for the amount of streaming done
21 by those individual webcasters?

22 A The prices that we charge webcasters fall

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1 short -- in the personal packages that I was talking
2 about, without the addition of the advertising and
3 subscription revenues, the price charged to the
4 webcasters would not cover the cost of the
5 broadcasting and royalties.

6 Q I would refer you to SoundExchange Exhibit
7 Number 15. I believe it's behind you.

8 A Uh-huh. Yes.

9 Q For instance, on the intro package at 595 on
10 page 2, on the pricing on page 2 of that document --

11 A Yes.

12 Q -- do you know what the royalties would be on
13 the amount of streaming permitted in the intro package
14 for which the webcaster pays \$5.95?

15 MR. DeSANCTIS: I want to object to this line
16 of questioning, and actually -- well, I object because
17 I do not believe that Exhibit 15 was admitted into
18 evidence and counsel is now reading from it and seems
19 to be wanting the witness to read from it as well.
20 This was a document that I believe the witness --
21 well, this was not admitted into evidence, and my
22 objection is that counsel is reading from it into the

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1 record and asking the witness to do the same.

2 CHIEF JUDGE SLEDGE: Mr. Oxenford?

3 MR. OXENFORD: Mr. DeSanctis asked questions
4 about it. The document is in front of the witness.
5 The mere fact that it hasn't been admitted -- I'm
6 asking him questions about whether he knows the amount
7 of costs that would be incurred by a webcaster who
8 would be streaming this amount.

9 CHIEF JUDGE SLEDGE: Objection sustained.

10 BY MR. OXENFORD:

11 Q Mr. Floater, when you stated that you
12 understood that settlement discussions with
13 SoundExchange were ongoing, what was the basis of your
14 statement?

15 A I get requests for proposals and stories. In
16 fact, I believe not within the last few weeks they
17 had -- Mr. Huppe had -- or somebody from SoundExchange
18 had come across you and asked that Live365 should come
19 to the table with a proposal, and the company asked me
20 to revisit the proposal we had make [sic] in the
21 aggregators so we could go back to the story.

22 So it seems even in the last few weeks these

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1 conversations were going on.

2 MR. OXENFORD: No further questions, Your
3 Honor.

4 CHIEF JUDGE SLEDGE: Any further cross?

5 MR. DeSANCTIS: Just a little bit, Your
6 Honor.

7 CHIEF JUDGE SLEDGE: All right.

8 RECROSS EXAMINATION

9 BY MR. DeSANCTIS:

10 Q You stated, Mr. Floater, just now, that --
11 let me back up. Let me withdraw that and start over.

12 You were asked on redirect the basis for your
13 understanding that settlement discussions with
14 SoundExchange are ongoing. Do you remember that?

15 A Yes.

16 Q And the basis was that your counsel told you
17 that SoundExchange had asked Live365 to make an offer;
18 is that right? I'm just -- did I get the testimony
19 correct?

20 A Yes.

21 Q You don't know, do you, whether SoundExchange
22 first approached Live365 or whether Live365 first

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1 approached SoundExchange in these last few weeks, do
2 you?

3 A The conversation that I heard about the
4 recent communication was that SoundExchange approached
5 Mr. Oxenford.

6 Q And who were you told that by?

7 A Mr. Oxenford.

8 MR. OXENFORD: Objection, Your Honor.
9 Attorney/client privilege.

10 CHIEF JUDGE SLEDGE: Mr. Oxenford, you opened
11 that door. You waived any privilege.

12 BY MR. DeSANCTIS:

13 Q Mr. Oxenford didn't tell you what
14 precipitated his account of events, did he?

15 MR. OXENFORD: Objection, Your Honor. I did
16 not get into any substance of any conversations. I
17 merely asked the question how he knew and whether he
18 knew that settlement discussions were ongoing.

19 CHIEF JUDGE SLEDGE: Mr. DeSanctis?

20 MR. DeSANCTIS: I actually think it's quite
21 relevant for counsel to have opened the door,
22 presumably knowing what that answer was going to be,

1 that this was because of something his counsel relayed
2 to him. And then to object when I try to pry the
3 scope of this witness' knowledge on those events I
4 think is very improper. I'm just trying to probe the
5 scope of this witness' knowledge on those events and
6 perhaps dispel any misimpressions that the statement
7 he made might have given.

8 CHIEF JUDGE SLEDGE: The whole testimony is
9 improper. For Mr. Oxenford to ask the question
10 whether there were settlement discussions over this
11 proceeding was improper. The answer was improper, but
12 you made no objection to that answer.

13 Your question is improper as to what
14 settlement discussions may occur between the parties
15 as to this proceeding. Those settlement discussions
16 are not permitted to be presented to the court. And
17 both sides are doing it.

18 Since, finally, there is an objection, it is
19 sustained.

20 BY MR. DeSANCTIS:

21 Q Mr. Floater, the ongoing discussions that you
22 were informed about -- I'm not asking any terms of it,

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1 but that related to this proceeding for the Web III
2 rates, correct?

3 A I wouldn't know that conversation. As I
4 mentioned, my involvement was to resurrect the
5 aggregator concept and the elements that were involved
6 in that to -- and that discussion, those terms were
7 related to 2006 on.

8 Q So you provided those terms, but you don't
9 actually know what was asked for, correct?

10 A I know what I was asked for, yes.

11 Q You don't know what Live365 was asked for,
12 correct?

13 A Correct.

14 MR. DeSANCTIS: No further questions, Your
15 Honor.

16 CHIEF JUDGE SLEDGE: Any questions from the
17 bench?

18 JUDGE WISNIEWSKI: Just one. Mr. Floater,
19 the other webcasters that Live365 webcasts compete
20 with on the Internet, do some of them have different
21 models or approaches from Live365 insofar as they come
22 up with their own programming and setup for their

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1 stations as opposed to Live365 relying on their
2 customers to come up with that programming and setup?

3 THE WITNESS: I think there are a variety of
4 business models, yes, in the marketplace.

5 JUDGE WISNIEWSKI: Sure. And I only asked if
6 there are some that fall into the category I just
7 described.

8 THE WITNESS: Yes.

9 JUDGE WISNIEWSKI: That's all. Thank you.

10 CHIEF JUDGE SLEDGE: Judge Roberts?

11 JUDGE ROBERTS: No.

12 CHIEF JUDGE SLEDGE: I had a question
13 earlier. Let me see if I can find it.

14 It must not have been very important. All
15 right, sir. That completes your testimony. You're
16 excused.

17 THE WITNESS: Thank you, Your Honor.

18 (Witness excused.)

19 CHIEF JUDGE SLEDGE: Mr. Oxenford, does the
20 rest of your document that you filed Friday remain
21 correct?

22 MR. OXFORD: Yes, Your Honor. We will have

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1 Ms. Lockhart at 9:30 a.m., followed by Mr. Fratrik.

2 CHIEF JUDGE SLEDGE: Earlier in the
3 proceeding you told me that you would present
4 witnesses to testify about the payment of
5 Webcasting II royalties. Is that statement true?

6 MR. OXENFORD: Mr. Floater testified about
7 that this morning, Your Honor.

8 CHIEF JUDGE SLEDGE: The testimony we've
9 gotten from Mr. Floater is what you're saying is --
10 fits your description of it?

11 MR. OXENFORD: Yes, Your Honor.

12 CHIEF JUDGE SLEDGE: And there will be no
13 other testimony?

14 MR. OXENFORD: No, Your Honor.

15 CHIEF JUDGE SLEDGE: All right. We'll be in
16 recess until 9:30.

17 (Whereupon, the hearing adjourned at
18 4:15 p.m., to reconvene at 9:30 a.m., Tuesday,
19 April 27, 2010.)

20

21

22

1 CERTIFICATE OF COURT REPORTER

2 I, Denise M. Brunet, the court reporter
3 before whom the foregoing proceedings were taken, do
4 hereby certify that the proceedings were taken by me
5 stenographically and thereafter reduced to print by
6 means of computer-assisted transcription by me; that
7 said proceedings are a true record; that I am neither
8 counsel for, related to, nor employed by any of the
9 parties to this litigation and have no interest,
10 financial or otherwise, in the outcome of this matter.

11

12

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15

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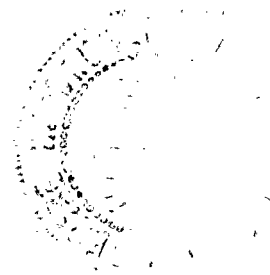
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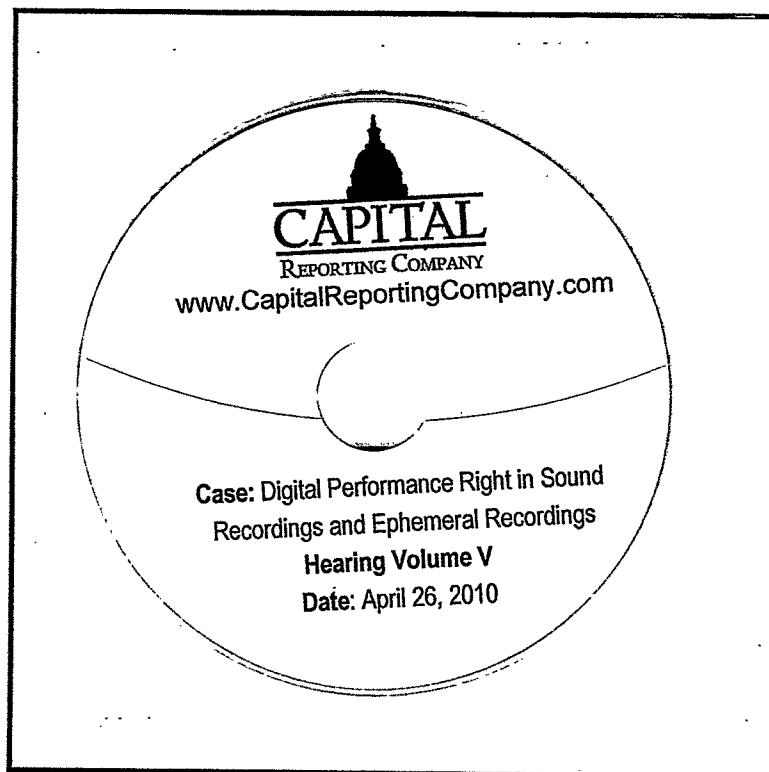
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